

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MINNESOTA

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4
5 **In Re: RFC and RESCAP Liquidating Trust Litigation**

6
7 File No. 13-cv-3451 (SRN/HB)

8
9 **ResCap Liquidating Trust,**

10 **Plaintiff,**

11 **v.**

12 **Primary Residential Mortgage, Inc.**

13 **Defendant.**

14
15 File No. 16-cv-4070 (SRN/HB)

16
17 St. Paul, Minnesota

18 Courtroom 7B

19 March 12, 2020

20 8:32 a.m.

21 -----
22 **BEFORE:**

23 The Hon. **SUSAN RICHARD NELSON,**

24 United States District Judge

25 **BENCH TRIAL - VOLUME XII**

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I N D E XPAGE**JIM CRAWFORD**

Direct Examination By Mr. Clouser	2405
Cross Examination By Ms. Winter	2440
Redirect Examination By Mr. Clouser	2482

JUSTIN MCCRARY

Direct Examination By Mr. Nicholson	2486
Cross-Examination By Mr. Nesser	2595

PLAINTIFF'S EXHIBITSREC'D

25	2411
29	2462
30	2462
38	2460
39	2461
41	2462
42	2462
98	2402
145	2634
153	2644
357	2474
462	2402

DEFENDANT'S EXHIBITSREC'D

84	2401
98	2401
200	2401
217	2422
227	2431
257	2425
443	2653
494	2632
497	2632
502	2632
508	2632
509	2632
510	2632
511	2632
512	2632
513	2632
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	536	2633
5	537	2653
	539	2633
6	541	2633
	568	2632
7	569	2632
	578	2634
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P R O C E E D I N G S

I N O P E N C O U R T

THE COURT: All right. Well, I want to start by thanking the administrative folks from Williams & Connolly, from Zelle, from Quinn Emanuel, from Spencer Fane. My staff, I mean, really, they have been e-mailing me at all hours of the morning. This has been an incredible effort to make this work, and I think those are the folks who really deserve a lot of credit. Of course, not to mention the folks in Utah, the folks in SDNY. Everybody has really come together. I'm very impressed with the effort that's gone into this. So on behalf of the Court, I thank all of you.

We are here for our pre-meeting this morning before we begin with Mr. Crawford, I believe, in Utah. Is there anything the parties wish to address with the Court?

Mr. Nicholson.

MR. NICHOLSON: Good morning, Your Honor. Matt Nicholson from Williams & Connolly for PRMI. I wanted to address one issue regarding Dr. McCrary's testimony. He's expected to testify later today via video.

This morning at 7:41 a.m. we received an e-mail from plaintiff's counsel adding two new exhibits to their cross disclosure for Dr. McCrary. These exhibits were, first, Mr. Woll's trial testimony from this trial and second, a declaration of Jeffrey Lipps.

1 Now, we objected to these disclosures because they
2 are untimely. I believe the disclosure process required
3 plaintiff to disclose cross exhibits three days ago so that
4 we could prepare Dr. McCrary and it's obviously untimely to
5 disclose something at 7:41 a.m. the morning of a witness's
6 testimony.

7 Now, of these two documents, I'm less concerned
8 about Mr. Woll's trial testimony. I'll say to the Court
9 that Dr. McCrary did rely on Mr. Woll's opinions and he has
10 reviewed Mr. Woll's trial testimony.

11 But I do have very significant concerns with
12 respect to the declaration of Jeffrey Lipps, which was the
13 second document disclosed. That's DTX-537. This is a
14 document that Mr. -- or Dr. McCrary does not rely on in his
15 report, does not cite at any point, hasn't been asked about
16 it at any of his depositions, that we didn't know that they
17 intended to use until this morning.

18 I haven't had a chance to talk to Dr. McCrary. I
19 don't even have the ability to contact him to let him know
20 that this has been added. He was travelling to the SDNY
21 this morning. I talked to him before he left, but he can't
22 even have a cell phone in the SDNY, so there's no even way
23 for me to alert him that this has been added to his cross
24 disclosure, much less to discuss it with him.

25 Like I said, it's a document that he doesn't even

1 rely on. So I think it's unfair to add this so late in the
2 game. So we would ask that that document be stricken from
3 plaintiff's cross disclosure.

4 Thank you.

5 THE COURT: Thank you. Wholly apart from the
6 merits of your position, which I will address after I hear
7 from plaintiffs, my understanding, Mr. Nicholson, is that it
8 is true that Dr. McCrary can't have a cell phone with him,
9 but that there is a lawyer -- and maybe Joe can correct me
10 if I'm wrong -- who has a cell phone who is with him. Am I
11 right about that?

12 MR. NICHOLSON: Go ahead.

13 THE COURT: There is -- Mr. Clouser, there's a way
14 to reach him?

15 MR. CLOUSER: Yes, one of plaintiff's counsel is
16 at the courthouse and she has a cell phone. That is my
17 understanding. And so if we need to call, we could contact
18 plaintiff's counsel and they presumably could contact
19 Dr. McCrary.

20 THE COURT: And this is not a comment on the
21 merits of your position. I just wanted the record to be
22 clear that if you needed to communicate with him for
23 whatever reason, that I wanted to make sure there was a way
24 to reach him.

25 There was some question about whether I could do

1 an order permitting him to have a cell phone, but the sense
2 I had from the Clerk's Office is that that might not be
3 acknowledged, so I didn't go ahead and do that. Otherwise I
4 probably would have done that. But the reason I didn't go
5 forward and push it or call out there was because I
6 understood there was a communication means.

7 MR. NICHOLSON: Yes, Your Honor, I understand
8 that.

9 THE COURT: Okay.

10 MR. NICHOLSON: And Dr. McCrary left early this
11 morning to be at SDNY so that he will be there well in
12 advance of whenever his testimony begins. It is our
13 understanding that if we needed to give him some emergency
14 message or alert him to when the testimony would start, that
15 plaintiff would relay that via that cell phone with their
16 counsel, but we don't have the ability as defense counsel to
17 contact him.

18 THE COURT: The other -- I mean, while we're
19 talking about it, we were notified this morning as well, and
20 maybe all of you were too, that the bench is considering the
21 possibility of closing down the SDNY for any outsiders,
22 including witnesses, today, but they will presumably tell us
23 if that occurs.

24 MR. NICHOLSON: Okay. We don't have any
25 information about that at this time, but we'll advise the

1 Court if we do hear that.

2 THE COURT: Okay. Thank you, Mr. Nicholson.

3 Okay. Who wishes to address this.

4 MR. NESSER: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. NESSER: Before I start, I thought it would be
7 appropriate to return the thank you, I think, on behalf of
8 everyone for the Court's efforts yesterday, which were
9 remarkable by any standard.

10 On the issue of the exhibits, as Mr. Nicholson
11 indicated, the Woll transcript is part of the trial
12 transcript. Frankly, it's not clear to me that it was
13 necessary to disclose it. We did it just to be safe. But
14 it's trial transcript for impeachment, so I don't believe
15 that's an issue. And as Mr. Nicholson indicated, Dr.
16 McCrary has already read that and so it seems pretty clear
17 that that ought to be okay.

18 On Mr. Lipps's declaration, again, that was purely
19 for impeachment purposes potentially. It may not be
20 something that we wind up using. And, of course, we had
21 the -- I believe it was an agreement with Mr. Butler that
22 experts can be asked questions about materials that they did
23 not rely upon.

24 And so I think it ought to be okay, but in any
25 event, our view is that this is -- this ought to be just

1 addressed in the context of the examination as and if it
2 occurs, because it's not clear to me that it will.

3 THE COURT: All right. It sounds like -- yeah, I
4 would be glad to hear from Mr. Nicholson again, but it
5 sounds like the concern is that he has not reviewed the
6 declaration of Mr. Lipps.

7 MR. NESSER: Yes. That's understood, Your Honor.

8 THE COURT: Let me hear from Mr. Nicholson for a
9 moment.

10 MR. NICHOLSON: So, Your Honor, I don't see how
11 this would be relevant to the issue of impeachment, the
12 Lipps declaration. It's not Dr. McCrary's prior statement
13 and it's not something that he relies on in his report, so I
14 don't see how it could be used to impeach him.

15 With respect to Mr. Nesser's second argument that
16 you can cross-examine an expert with materials not relied
17 on, we agree with that as a general proposition, but you
18 have to disclose those through the protocol so that the
19 expert has a chance to prepare for cross-examination on that
20 document. And there was no opportunity here whatsoever to
21 prepare Dr. McCrary to testify on the Lipps declaration.

22 So I don't think either of those arguments
23 provides a valid basis for them to include this on the cross
24 disclosure and it should be stricken now. There's no reason
25 to wait until the context of his testimony.

1 THE COURT: All right. I think there doesn't seem
2 to be a concern about Mr. Woll's trial testimony.
3 Apparently Dr. McCrary has reviewed it and has relied on
4 Mr. Woll's opinions.

5 But I'm concerned that Dr. McCrary has not
6 reviewed the declaration of Jeffrey Lipps nor was it
7 disclosed to him until this morning. So I think it's fair
8 that that not be used for cross-examination.

9 Okay. Mr. Nesser.

10 MR. NESSER: One other separate issue.

11 THE COURT: Sure.

12 MR. NESSER: Apropos to the discussion at the
13 beginning of the hearing, the order that the Court issued
14 yesterday is something that I think others certainly at
15 Quinn would be interested in seeing given we're dealing with
16 these issues in lots of courts. Does the Court expect to
17 issue a redacted version of that or is that something the
18 parties can redact by agreement? That was a question sent
19 to me.

20 THE COURT: I think it's redacted primarily out of
21 concern for the privacy of the lawyers from Quinn. So I
22 have to think about whether I should formally ask you for
23 permission or the law firm for permission to do that. I
24 think that's why -- there's nothing else in the order
25 that's --

1 MR. NESSER: Well, there was Mr. Crawford's wife.

2 THE COURT: Well, that's true, yes, and that would
3 be very important to redact, yeah. I don't know.
4 Mr. Nicholson, do you have a thought about that?

5 I think the Court could do a redacted order, yeah.
6 Perhaps the parties could meet and confer and propose
7 redactions and then I would know what your views were on
8 that.

9 Mr. Nicholson.

10 MR. NICHOLSON: We would be willing to meet and
11 confer on that. Just to note, I think there is personal
12 information about Mr. Crawford as well as Dr. McCrary's
13 family, so we would want to have an opportunity to redact
14 that as well.

15 THE COURT: That's true. Okay. Why don't you
16 meet and confer. You can decide what to redact. I would be
17 glad to do a redacted order. Thank you, Mr. Nesser.

18 MR. NESSER: Thank you.

19 THE COURT: All right. Anything else we should
20 address?

21 Yes, Mr. Clouser.

22 MR. CLOUSER: Yes, Your Honor. Keith Clouser from
23 Williams & Connolly on behalf of PRMI.

24 At this time we've got a couple of things that
25 PRMI intends to move into evidence.

1 So, first, pursuant to the parties' agreement,
2 PRMI moves into evidence the designated deposition testimony
3 of Sharon Maki and Kathlene Meadows subject to the
4 plaintiff's objections and counter-designations and the
5 Court's forthcoming rulings on those objections. This is in
6 lieu of live trial testimony in this case.

7 THE COURT: Have you provided the Court with those
8 fully marked-up transcripts?

9 MR. CLOUSER: We have not yet. The specific
10 designations being offered and the transcripts -- we
11 intended to file on the docket the chart of designations
12 with objections, as we did previously, and then we would
13 submit binders containing the transcripts highlighted and
14 any exhibits that are associated with the designated
15 testimony.

16 THE COURT: And two questions. Do you have an
17 anticipated date that you would do so and are there
18 objections to the admission of the exhibits?

19 MR. CLOUSER: We hoped to do so this afternoon in
20 terms of filing, the designations on the record. And with
21 respect to exhibits, there are objections to those exhibits,
22 so they will be moved into evidence subject to those
23 objections and the court's ruling, as we have done before.

24 THE COURT: Okay. So the sooner the better. I
25 mean, it doesn't have to be this afternoon, but certainly no

1 later than midweek next week I'd like a complete set of all
2 of the deposition designations.

3 MR. CLOUSER: Yes, Your Honor. We will make
4 sure --

5 THE COURT: And I think these may be the only ones
6 I don't have. Is that correct?

7 MR. CLOUSER: I believe that's correct, Your
8 Honor.

9 THE COURT: Okay.

10 MR. CLOUSER: So in connection with the testimony
11 of Sharon Maki, PRMI moves into evidence the following
12 documents subject to plaintiff's objections and the Court's
13 forthcoming rulings on those objections: DTX-102, which
14 corresponds to Deposition Exhibit 605-0014; DTX-050, which
15 corresponds to Deposition Exhibit 605-0015; as well as
16 Deposition Exhibit 145-0011; DTX-787, which corresponds to
17 Deposition Exhibit 605-0020; DTX-082, which corresponds to
18 Deposition Exhibit 605-0021; DTX-083, which corresponds to
19 Deposition Exhibit 605-0022; and DTX-085, which corresponds
20 to Deposition Exhibit 605-0023.

21 THE COURT: Okay. So let me review these. Tell
22 me if I got this right. DTX-102, DTX-050, DTX-787, DTX-082,
23 DTX-083, and DTX-085 are received into evidence.

24 MR. CLOUSER: Your Honor, those are being moved in
25 subject to objections.

1 THE COURT: Oh, there's objections.

2 MR. CLOUSER: I apologize, Your Honor.

3 THE COURT: Sorry. They are not received in
4 evidence. I didn't understand that you were moving exhibits
5 that were subject to objections.

6 MR. CLOUSER: My apologies, Your Honor.

7 THE COURT: I don't think we've done that every
8 time. I'm not sure, but all right.

9 MR. CLOUSER: And then in connection with the
10 testimony of Kathlene Meadows, PRMI moves into evidence the
11 following documents subject to plaintiff's objections and
12 the Court's forthcoming rulings on those objections:
13 PTX-083, which corresponds to Deposition Exhibit 601-0023.
14 And that was PTX.

15 THE COURT: PTX.

16 MR. CLOUSER: Thank you, Your Honor. At this time
17 PRMI also moves into evidence DTX-789. This is a Rule 1006
18 summary exhibit prepared from a voluminous spreadsheet
19 produced by plaintiff in this action that reflects
20 information regarding the 463,000-plus loans contained in
21 the global population of at-issue loans from which
22 plaintiff's expert sampled.

23 PRMI disclosed this exhibit in connection with the
24 four-day disclosure protocol and understand plaintiffs have
25 not raised any objection to the introduction of this summary

1 exhibit.

2 THE COURT: All right. Do plaintiffs wish to
3 respond to the motion to admit DTX-789?

4 MR. MILLER: I apologize, Your Honor. Could we
5 have a moment to confer?

6 THE COURT: Oh, of course.

7 MR. MILLER: Thank you.

8 (Pause in proceedings.)

9 MR. MILLER: Your Honor, I think we'll need a
10 couple of hours to review this exhibit. If it's okay with
11 the Court, we would like to take some time today and to
12 formulate whether we have an objection to this.

13 THE COURT: That's fine. We'll just defer ruling
14 on it.

15 MR. MILLER: Thank you.

16 THE COURT: Mr. Clouser.

17 MR. CLOUSER: Just to note for the record, this
18 exhibit was disclosed to plaintiffs four days ago in
19 connection with the four-day disclosure protocol and
20 transmitted to the Court two days ago, cc'ing plaintiffs.
21 So they should be well aware of the Exhibit, but
22 nevertheless we will move on.

23 Finally, Your Honor, PRMI seeks to move into
24 evidence the complete set of available deal documents for
25 the at-issue trusts. These documents are Exhibits

1 DTX-1001.0001 through --

2 THE COURT: Try that again. 1001.

3 MR. CLOUSER: DTX-1001.0001 through DTX-1001.049,
4 DTX-1006.0001 through DTX-1006.0055, and DTX-1016.0001
5 through DTX-1016.0506.

6 Each set of deal documents PRMI believes is
7 independently relevant, as each contains representations
8 that the parties contend were the basis of claims made in
9 the bankruptcy. And these documents are not cumulative
10 because each document is an operative agreement for a
11 specific deal that is at-issue in this litigation.

12 PRMI believes it is appropriate to provide the
13 fact-finder the complete set of these documents rather than
14 the patchwork set that is currently in the record for these
15 deal documents.

16 And we also think it's helpful to have these deal
17 documents in the record in the event that the Court is
18 interested in reviewing any particular language from a deal
19 or set of deals.

20 With respect to -- the parties have agreed that
21 with respect to individual deal documents or sets of deal
22 documents, those documents may be introduced and are
23 stipulated to be admissible. And we don't believe there's
24 any meaningful distinction between introducing a subset of
25 the deal documents, which has been done in this case already

1 and stipulated to in this case already, and introducing the
2 complete set of deal documents, as PRMI is proposing to do.

3 THE COURT: So, as I understand it, there is a
4 disagreement about this?

5 MR. CLOUSER: Plaintiffs have indicated that they
6 object to the introduction of all of the deal documents.

7 THE COURT: Okay. Let me hear from the
8 plaintiffs.

9 MR. MILLER: Good morning, Your Honor. Jeff
10 Miller on behalf of plaintiffs.

11 THE COURT: Good morning.

12 MR. MILLER: So the parties have been going back
13 and forth over the last month, I suppose, on how to handle
14 these underlying transaction documents and the plaintiff's
15 position has been that it is unnecessary and in our view
16 inappropriate to lard up the record with thousands of
17 transaction documents that have never been the subject of
18 any testimony from any witnesses in this action.

19 And that position is partly founded on the concern
20 that the effort to introduce these exhibits is motivated by
21 some desire to have these documents in the record for a
22 purpose that hasn't been disclosed and hasn't been the
23 subject of this trial.

24 So to that end we've had a working agreement with
25 PRMI to introduce deal documents if being used with a

1 witness in a meaningful fashion, which has reflected our
2 position that if either side has something meaningful to do
3 with the deal documents or intends to do something
4 meaningful with the transaction documents, they could be
5 introduced.

6 Last week PRMI asked us about introducing the 1006
7 exhibit, which was DTX-786, that summarizes the at-issue
8 representations across the 506 at-issue trusts. Professor
9 Schwarcz discussed that exhibit in his testimony, it had a
10 role in his testimony, and we agreed to the admission of
11 that exhibit and thought that that was the end of that
12 issue.

13 So now that PRMI is seeking to introduce all of
14 the transaction documents underlying the 506 trusts strikes
15 us as perplexing because we understood that the entire point
16 of DTX-786, the 1006 exhibit, was to summarize those
17 transaction documents and that 1006 was admitted.

18 So what PRMI is now seeking to do is to introduce
19 1,010 documents into evidence. About half of these, I
20 believe it's the DTX-1016.001 through .0506, so 506, so I
21 believe half of these are Pooling and Servicing Agreements,
22 which can run hundreds of pages. It's the veritable
23 definition of voluminous writings that cannot be
24 conveniently examined in court, which is precisely what Rule
25 1006 was designed to address.

1 So the Rule 1006 is in evidence and the question
2 now is what is the need for introducing these additional
3 transaction documents and what is their purpose. PRMI has
4 not articulated a basis other than in the event there is a
5 dispute in post-trial briefing concerning the documents, the
6 Court would have them as a resource.

7 But the vague hypothetical possibility that an
8 issue may arise later is not a basis for adding thousands
9 of -- or over a thousand transaction documents to the record
10 now. If there's a dispute later, the parties can address it
11 then, as is appropriate.

12 Our other concern is foundation. PRMI has not
13 laid the foundation for these thousand documents they want
14 to introduce.

15 So, in closing, we don't believe that literally
16 over 1,000 documents need to be moved into evidence. The
17 parties have been entering deal documents as they have been
18 used with witnesses and those witnesses have established
19 their foundation. Many witnesses have testified at length
20 about the meaning of those transaction documents and the
21 risk they created for RFC, and that's the issue before the
22 Court.

23 PRMI has a 1006 in evidence as substantive
24 evidence that summarizes the transaction documents. So
25 there's no need for these additional documents.

1 And, moreover, PRMI wouldn't be able to lay
2 foundation with a witness for them, which is why there's a
3 Rule 1006 in the first place.

4 So we would object to the admission of these
5 thousand-plus documents into evidence.

6 Thank you, Your Honor.

7 THE COURT: Thank you.

8 Mr. Clouser.

9 MR. CLOUSER: Thank you, Your Honor. As an
10 initial matter, PRMI proposes to submit these documents
11 electronically on a thumb drive so as not to create a
12 massive amount of paper for Your Honor or for the Court in
13 general. That, I think, should alleviate the concern about
14 the extent of the pages of these documents.

15 With respect to the issue raised by plaintiff's
16 counsel regarding foundation, the parties had agreed that
17 deal documents could be introduced without respect to a
18 witness and without respect to establishing the foundation
19 of those documents at trial.

20 On trial day February 14th plaintiff moved in,
21 without a witness, a set of documents the plaintiff
22 contended were a representative sample or a representative
23 set of the deal documents. PRMI obviously disagrees that it
24 is a representative set. But setting that aside, at that
25 time plaintiff's counsel noted that the parties had an

1 agreement that any set of transaction documents that they
2 would like into evidence could be moved into evidence.

3 But, you know -- so although plaintiff has
4 objected to moving in the entire set of deal documents, we
5 believe there's no meaningful distinction between the two
6 positions.

7 THE COURT: I think the question is this. The
8 question is whether it's unnecessarily duplicative. And if
9 the point is to provide a document that shows me all the
10 reps and warranties in these deal documents, that apparently
11 has been accomplished through the 1006 summary in DTX-786.

12 And so I think the fear is ambush, that in
13 closings or in findings of fact later on there will be a
14 disclosure of something in the deal documents that was never
15 discussed by a witness or an attorney.

16 And so when I weigh and balance that, I guess I
17 need to understand what in the deal documents I would look
18 for other than what appears on the 1006 summary.

19 MR. CLOUSER: Your Honor, the 1006 identifies --
20 it's essentially a count of the representations that are in
21 that voluminous set, but does not provide the Court the
22 language of all of the representations in the deal documents
23 itself.

24 THE COURT: But I've seen lots of versions of the
25 language. I'm not sure that the language -- that I'm going

1 to see a version -- or perhaps that's what the ambush worry
2 is, is that there's something there that you want to spring
3 later.

4 So I need to be satisfied that there really is a
5 reason over and above the 1006 summary, because otherwise it
6 sounds utterly redundant.

7 MR. CLOUSER: Your Honor, we do not intend to
8 ambush with, you know, information that wasn't discussed at
9 trial.

10 THE COURT: So you wouldn't be addressing either
11 in closings or in any subsequent finding of fact or
12 conclusions of law any part of those deal documents that
13 hasn't already been discussed?

14 MR. CLOUSER: I do not believe so, although --
15 yeah, I don't believe so, Your Honor. The deal documents --
16 the intent to move in the deal documents would be to provide
17 the Court, rather than the haphazard set of, you know, a
18 document from this deal, but not all of the documents from
19 one deal, you know, the haphazard set that is in the record
20 at the moment, this would simply provide a complete set of
21 the deal documents that were referenced at trial and the
22 remainder of the at-issue deal documents.

23 THE COURT: Okay. Mr. Miller, do you think
24 there's an agreement that we can reach here that if at no
25 time in the future in this litigation or on appeal there is

1 any reference to any portion of the deal documents that were
2 not, in fact, in some way disclosed during the trial, either
3 in the 1006 summary or in testimony of a witness, that then
4 just for the sake of the record we would have all the deal
5 documents?

6 MR. MILLER: Your Honor, if I may have a moment to
7 discuss with my team?

8 THE COURT: Sure, sure.

9 (Pause in proceedings.)

10 THE COURT: Okay. Mr. Miller.

11 MR. MILLER: Your Honor, I think the Court has
12 ably articulated our concern. And as to the proposal
13 between the parties or for the parties, I think our concern
14 continues to be that these have been addressed at length,
15 various versions of various representations have been
16 addressed at length between the parties and so I think
17 plaintiff's issue is we're frankly -- we don't know what
18 there could be other than what's already been presented in
19 Court.

20 And so the question of they will be admitted as
21 long as they are not used outside of Court, we just -- our
22 concern right now is it just seems to be sort of uncharted
23 territory, which is risky, as has previously been discussed
24 in this court. So that's our concern.

25 THE COURT: All right. Mr. Clouser.

1 MR. CLOUSER: Thank you, Your Honor. We sort of
2 agree with plaintiffs that it's a little bit of uncharted
3 territory and so what we propose to do, PRMI can identify a
4 representative set of the deal documents that were discussed
5 by PRMI's experts at trial. So for each trust that was
6 disclosed or discussed by an expert, one of PRMI's experts,
7 Mr. Schwarcz, Mr. Burnaman, Mr. Woll, or Ms. Keith, PRMI can
8 identify a representative set of -- or a set of the deal
9 documents that includes the complete documents for each of
10 those deals. That would be a substantially smaller number
11 and I think would be consistent with what plaintiff has done
12 in their own case-in-chief. So we're willing to meet and
13 confer with plaintiffs about that.

14 THE COURT: Okay. I'll just hear back from you on
15 that.

16 MR. CLOUSER: Thank you, Your Honor.

17 THE COURT: You bet. All right. Yes.

18 MS. QUINN: For continuity, Your Honor, Laurie
19 Quinn of Spencer Fane for plaintiff. At this time we
20 thought we would just move in a handful, I think there were
21 five or six total exhibits relating to the depositions that
22 defense counsel just entered into evidence and I do not
23 believe there are any objections to our exhibits.

24 THE COURT: Okay. So, as I understand it, you are
25 seeking the admission of exhibits to the depositions of Maki

1 and Meadows?

2 MS. QUINN: That is correct.

3 THE COURT: And you don't believe there's any
4 dispute about them?

5 MS. QUINN: I do not believe we've heard of any or
6 that defendant has posed any objections. I'm sure they will
7 correct me if I'm wrong.

8 THE COURT: Okay. Go ahead.

9 MS. QUINN: So with respect to Ms. Maki, the Trust
10 moves into evidence DTX-084, which corresponds with
11 Deposition Exhibit 605-0024, and I do not believe there's an
12 objection.

13 MR. CLOUSER: No objection.

14 MS. QUINN: Same witness, DTX -- the Trust moves
15 into evidence DTX-098 and that corresponds with Deposition
16 Exhibit 605-0027.

17 MR. CLOUSER: No objection, Your Honor.

18 MS. QUINN: And then finally for Ms. Maki, the
19 Trust moves into evidence DTX-200, which corresponds with
20 Deposition Exhibit 145-0024.

21 MR. CLOUSER: No objection.

22 THE COURT: All right. DTX-084, DTX-098, and
23 DTX-200 are received into evidence.

24 MS. QUINN: And then moving on to Ms. Meadows, the
25 Trust moves into evidence PTX-098, and that corresponds with

1 Deposition Exhibit 601-0020.

2 MR. CLOUSER: No objection, Your Honor.

3 MS. QUINN: And then PTX-462, corresponding with
4 Deposition Exhibit 601-0021.

5 MR. CLOUSER: No objection.

6 MS. QUINN: And then, finally, just for the
7 record, I believe this has actually been admitted already,
8 but this will relate to Ms. Meadows as well, PTX-1052,
9 corresponding to Deposition Exhibit 601-0022.

10 THE COURT: All right. The Court has confirmed
11 that PTX-1052 has previously been admitted. And PTX-098 and
12 PTX-462 are received into evidence.

13 MS. QUINN: And then also -- thank you, Your
14 Honor. With respect to Ms. Meadows, it was unclear if this
15 was part of Mr. Clouser's piece, so we would like to
16 affirmatively move in a set of affirmative designations with
17 respect to Ms. Meadows. We understand PRMI objects. So I
18 just want to put that on the record.

19 And in addition clarify for the Court, and we can
20 do this in writing if need be at a later time, that these
21 affirmative designations are not part of our case-in-chief
22 or a rebuttal. They are just within the scope of what her
23 cross-examination would have contained had she been called
24 live.

25 So we think it's well within the parties'

1 agreement as well as Rule 32 that we could designate
2 affirmatively in addition to counter-designations.

3 THE COURT: Okay. And you will make sure that
4 there's one deposition transcript that contains all of that?

5 MS. QUINN: That remains the parties' intention,
6 that everything will be in one chart, one transcript, and
7 made clear for the Court.

8 THE COURT: Very good. Thank you. Anything
9 further today so we don't keep Mr. Crawford waiting any
10 longer?

11 All right. Is everyone comfortable just moving
12 in? I'm sensitive of the time and his participation.

13 MR. CLOUSER: Yes, Your Honor.

14 THE COURT: All right. Let's go ahead and do
15 that, then.

16 Let's see. Do we know if the witness is there?

17 (Discussion held off the record.)

18 THE COURT: All right. Apparently there are some
19 logistics to take care of here, so we will take a 10-minute
20 break. Court is briefly adjourned.

21 (Recess taken at 9:08 a.m.)

22 * * * * *

23 (9:16 a.m.)

24 **IN OPEN COURT**

25 THE COURT: Please be seated.

1 All right. For the record, the Court notes that
2 Mr. Crawford will be testifying now via live video
3 transmission from the United States District Court for the
4 District of Utah. And on March 10th the Court issued an
5 order permitting this remote contemporaneous testimony
6 because of serious and significant concerns regarding the
7 ongoing coronavirus or COVID-19 virus outbreak.

8 For the sake of the record, the Court would note
9 that the Court and counsel can clearly see Mr. Crawford and
10 at all times I will ensure that the Court and counsel can
11 see and clearly hear him when he testifies.

12 As I understand it, the only time this may change
13 is if there is enlarging evidence on a screen, but other
14 than that, at all times there should be no issue with the
15 Court being able to fully understand Mr. Crawford and
16 evaluate his testimony.

17 All right. At this time, Mr. Crawford, can you
18 hear me?

19 THE WITNESS: Yes, I can.

20 THE COURT: All right. Sir, if you would please
21 raise your right hand.

22 Do you swear in the testimony you're about to give
23 to tell the truth, the whole truth, and nothing but the
24 truth, so help you God?

25 THE WITNESS: I do.

1 THE COURT: Very good. All right. As I
2 understand it, now you're going to see Mr. Clouser on the
3 video. Can you see him?

4 THE WITNESS: I can, yes.

5 THE COURT: And he will be the one asking you
6 questions on behalf of PRMI now. Okay?

7 THE WITNESS: Okay.

8 THE COURT: Mr. Clouser.

9 (Jim Crawford)

10 **DIRECT EXAMINATION**

11 BY MR. CLOUSER:

12 Q. Good morning. Would you please introduce yourself to
13 the Court.

14 A. My name is Jim Crawford.

15 Q. And, Jim, where are you testifying from today?

16 A. Salt Lake City, Utah.

17 Q. And where do you currently work?

18 A. Here in Salt Lake City at PRMI.

19 Q. What position do you currently hold?

20 A. I'm currently the branch controller of a retail branch
21 in Salt Lake City.

22 Q. And what is a branch controller?

23 A. Typically I handle the finances of the branch, the
24 accounting, HR. Essentially I just help run the branch.

25 Q. Tell us a little bit about yourself. Where are you

1 from?

2 A. Originally from California, but moved to Utah when I was
3 about six, so I have been here for over 40 years. I'm
4 married, have two kids, two grandkids. I graduated from the
5 University of Utah with an economics degree back in 1996.

6 Q. When did you start working at PRMI?

7 A. July 2001, I believe.

8 Q. Before you started at PRMI, tell us about your work
9 experience.

10 A. Well, prior to PRMI I worked for a mortgage company
11 called Crossland Mortgage, where I was a secondary marketing
12 analyst, which meant that I established rate sheets for our
13 sales force.

14 Q. And was Crossland Mortgage a loan originator?

15 A. Yes, it was.

16 Q. So moving forward in time, you said you started at PRMI
17 in 2001?

18 A. Correct.

19 Q. What was your role when you started at PRMI?

20 A. Secondary marketing manager.

21 Q. And at the time you started at PRMI, how was PRMI
22 structured?

23 A. It had two divisions. One, a retail division, which
24 dealt with borrowers with prime credit; and a wholesale
25 division, which dealt with borrowers with subprime or poor

1 credit.

2 Q. And which side of the business did you work in?

3 A. The wholesale division.

4 Q. Who did you work with in the wholesale division?

5 A. I worked with Yvonne Flitton, Scott Peterson, A.J.

6 Swope, Robb Plehn, Wendy Miller, to name a few.

7 Q. And what was your impression of your co-workers?

8 A. I enjoyed them very well. They are really good people.

9 Q. Can you describe for the Court your role as a secondary
10 marketing manager in the wholesale division at PRMI.

11 A. Sure. We established rate sheets and matrices for our
12 sales group that they could use to get borrowers in the
13 door, and on the back end we were responsible for selling
14 closed loans on the secondary market.

15 Q. You mentioned rate sheets. Can you provide a little
16 context as to what that is.

17 A. It was a physical rate sheet, like an Excel spreadsheet
18 that had loan-level details that the loan officers and the
19 sales executives would use to price out a loan.

20 Q. Were rate sheets used for underwriting loans?

21 A. No.

22 Q. And you also mentioned selling closed loans to
23 investors. What did that entail?

24 A. That meant that after the borrower closed a loan and
25 they were in their homes, we would take those loans and put

1 them in a pool and sell them on the secondary market.

2 Q. Your position as a secondary marketing manager, was that
3 an executive level position at PRMI?

4 A. No, it was not.

5 Q. In your role as secondary marketing manager, did you
6 underwrite loans?

7 A. No, I did not.

8 Q. Who were the investors to whom you sold loans as a
9 secondary marketing manager?

10 A. RFC, Countrywide, HSBC.

11 Q. And at RFC, who were your counterparts, who did you work
12 with?

13 A. I typically worked with the sales director, sales
14 manager, Renee Bangerter, Lori Zaloumis, Tina Diehl, people
15 in that role.

16 Q. And how long were you in the role of secondary marketing
17 manager at PRMI?

18 A. Approximately five years.

19 Q. And when did you change roles?

20 A. At the end of 2005, the first of 2006, I was promoted to
21 vice president of the wholesale division.

22 Q. Did your responsibilities change at that time?

23 A. It did. As secondary marketing manager I managed a
24 small group of two people and that changed to now managing
25 the sales force, the underwriters, the processors, the

1 closers, the wholesale division.

2 Q. And how long were you vice president of wholesale?

3 A. Just a month or so.

4 Q. And why such a short period of time?

5 A. PRMI decided to shut down their wholesale division.

6 Q. I'd like to focus now on your time as a secondary
7 marketing manager at PRMI between 2001 and the end of 2005.
8 Can you provide an overview of the process of how loans were
9 originated at PRMI in the wholesale division.

10 A. Yeah. We would provide rate sheets and matrices to our
11 sales force. They would work with brokers to get a borrower
12 in the door. Once the borrower was in the door, we would
13 then, you know, underwrite the loan, close the loan, and
14 eventually sell the loan in the secondary markets.

15 Q. And how did PRMI underwrite the loan?

16 A. We ran things through Assetwise Direct.

17 Q. When you sold closed loans to investors, did you sell
18 them one by one or multiple loans at a time?

19 A. Primarily multiple loans at a time in pools, but there
20 were occasions where we would sell them loan by loan.

21 Q. Why sell loans in pools as opposed to one by one?

22 A. We would get a higher price selling them in a pool.

23 Q. And was that typical in the industry, to get a higher
24 price for a pool?

25 A. Yes, it was.

1 Q. When you started at PRMI, were bulk pool sales the
2 primary way PRMI's wholesale division was selling loans to
3 RFC?

4 A. Yes, it was.

5 Q. Now, when selling a bulk pool of loans to RFC, how did
6 you offer a bulk pool? What was that process?

7 A. The process is we would provide a bid tape, which was
8 just an Excel spreadsheet that had all of the loan-level
9 details on it so they could review and decide if they wanted
10 to purchase these loans.

11 MR. CLOUSER: I'd like to show the witness
12 PTX-025. It has not yet been admitted, so it should not be
13 brought up on the screen.

14 BY MR. CLOUSER:

15 Q. Mr. Crawford, if you could turn in your binder to
16 PTX-025.

17 A. Got it.

18 Q. What is this document?

19 A. This is an e-mail from one of our employees to RFC
20 offering the latest bulk pool that we had. It looks like it
21 had 24 units for just under \$2.3 million.

22 Q. And you were copied on this e-mail, correct?

23 A. Correct.

24 Q. What is the date of this e-mail?

25 A. August 2nd, 2002.

1 Q. Do you have any reason to believe you did not receive
2 this e-mail?

3 A. No, I do not.

4 MR. CLOUSER: Your Honor, PRMI moves into evidence
5 PTX-025.

6 THE COURT: Any objection.

7 MS. WINTER: No objection.

8 THE COURT: PTX-025 is received in evidence.

9 BY MR. CLOUSER:

10 Q. Mr. Crawford, what is the purpose of this type of
11 communication?

12 A. It was to let RFC know that we had a pool of loans
13 available for sale.

14 Q. And looking at the attachment to that document, what is
15 that?

16 A. Sorry. Let me try to find it. I got it here.

17 This is a copy of the bid tape that we sent out to
18 RFC.

19 Q. And who were these loans being offered to again?

20 A. RFC.

21 Q. Did PRMI originate these loans with the intent to sell
22 them to RFC?

23 A. We did. That was our normal business practice, was to
24 originate and underwrite loans to investor guidelines with
25 the intent of selling them those loans.

1 Q. Is there anything on this document that indicates these
2 loans were intended for RFC?

3 A. There are a couple of things. In the notes in Section 1
4 it says, "All loans underwritten to RFC guidelines." And
5 then in the final column it has all their Assetwise Direct
6 approvals.

7 Q. And looking at that final column, why did you include
8 that column that referenced whether loans had been approved
9 by Assetwise Direct?

10 A. Well, we wanted RFC to know that they were all run
11 through Assetwise Direct.

12 Q. Was this the standard form that bid sheets took when you
13 were selling loans to RFC during your time as secondary
14 marketing manager?

15 A. Yes.

16 Q. And after you sent a bid tape to RFC, what happened next
17 in the ordinary process of selling loans to RFC?

18 A. RFC would review this bid tape, decide if they want to
19 purchase the pool, and then they would offer a bid back to
20 us.

21 Q. And what happened next in the process?

22 A. We would accept the bid. Once that was done, we would
23 then ship the physical files to RFC so they could review
24 them. During their review process they would pend loans,
25 kick out loans, and then we would work with them to get the

1 information they need to get the loans to purchase.

2 Q. When RFC provided a bid and PRMI agreed to that bid, was
3 there any sort of confirmation process?

4 A. RFC would send over a bulk confirmation letter once that
5 was agreed upon.

6 MR. CLOUSER: I'd like to show the witness
7 PTX-026. This has already been admitted into evidence.

8 THE COURT: Okay.

9 BY MR. CLOUSER:

10 Q. And, Mr. Crawford, if you will turn to the second page,
11 do you see this document?

12 A. I do.

13 Q. And what is this document?

14 A. This is an example of a bulk confirmation letter. It
15 shows the --

16 Q. It --

17 A. I'm sorry, go ahead.

18 Q. I apologize for interrupting. Please continue.

19 A. It just shows the number of loans that were being
20 purchased and the volume.

21 Q. Have you seen this type of letter before?

22 A. I have.

23 Q. And looking at this letter, do you see in the second
24 sentence it says, "GMAC-RFC has agreed to purchase this pool
25 of loans at a price of 104.750 percent providing they meet

1 the requirements of the GMAC-RFC Client Guide and" --

2 COURT REPORTER: Wait.

3 THE COURT: Why don't we try that again. When
4 you're reading, just go slow.

5 BY MR. CLOUSER:

6 Q. Do you see in the second sentence of the letter it says,
7 "GMAC-RFC has agreed to purchase this pool of loans at a
8 price of 104.75 percent providing they meet the requirements
9 of the GMAC-RFC Client Guide and are of investment quality"?

10 A. I do.

11 Q. Was that typical language in bulk confirmation letters
12 from RFC?

13 A. Yes, it was.

14 Q. And was it standard process for RFC to confirm a bulk
15 purchase with a bulk confirmation letter like this?

16 A. Yes, it was.

17 Q. What would happen after PRMI received a bulk
18 confirmation letter?

19 A. We would then ship the files to them so RFC could review
20 the files, and we would work with them on getting any
21 information or documents that they required to purchase the
22 loan.

23 Q. When you shipped loans to RFC, how did you prepare the
24 files?

25 A. Well, RFC required us to have a stacking order, so a

1 specific order of documents with the Assetwise Direct being
2 on top of the documents.

3 Q. And did you have an understanding of why RFC wanted the
4 Assetwise Direct approval on the top of the document?

5 A. My understanding was in their review process, they
6 reviewed it off the Assetwise Direct.

7 Q. Okay. What happened if RFC did not bid on a pool or
8 PRMI did not accept a bid?

9 A. I don't recall that ever happening, but we would have,
10 in turn, sold the loan to other investors.

11 Q. And you said you don't recall that happening. What do
12 you mean?

13 A. My recollection is that we agreed and accepted every bid
14 RFC gave us.

15 Q. In your experience -- strike that.

16 You mentioned that loans intended for RFC were
17 originated using Assetwise Direct; is that correct?

18 A. Correct.

19 Q. What did Assetwise Direct do in your understanding?

20 A. Assetwise Direct --

21 MS. WINTER: Objection, Your Honor, foundation.

22 THE COURT: I think you're going to have to
23 establish foundation with him. He's been explicit that he
24 wasn't an underwriter.

25 MR. CLOUSER: Sure.

1 BY MR. CLOUSER:

2 Q. Mr. Crawford, in your role as secondary marketing
3 manager, did you have an understanding of Assetwise Direct?

4 A. I did.

5 Q. And what was the basis of your understanding?

6 A. Well, through internal management meetings, you know, we
7 talked about it quite often throughout, you know, my time
8 there. I had discussions with my counterparts at RFC about
9 Assetwise Direct and just normal business conversations.

10 Q. And in your understanding, what did Assetwise Direct do?

11 A. It chose the product and the credit grade for the
12 borrower, and it also potentially upgraded their credit in
13 some cases.

14 Q. And when you say, "it chose the product," what do you
15 mean?

16 A. The loan program that RFC was offering.

17 Q. And what did you mean by selecting the credit grade?

18 A. The credit grade would be what the borrower was slotted
19 into. It basically told us that this borrower met this
20 criteria under this RFC program.

21 Q. And you also mentioned potential upgrades in Assetwise
22 Direct. What did you mean by that?

23 A. Well, occasionally Assetwise Direct would upgrade a
24 borrower to a higher credit grade.

25 Q. Why did PRMI use Assetwise Direct to originate loans for

1 RFC?

2 A. It was my understanding that it was required. I know it
3 was required by PRMI and as well as RFC.

4 Q. And what's the basis for your understanding that it was
5 required?

6 A. Well, like I said, it was PRMI policy that it was
7 required. And then just in my discussions with my
8 counterparts at RFC --

9 MS. WINTER: Objection, hearsay.

10 THE COURT: Hold on one second. He has to be --
11 he has already started the answer. Why don't you finish the
12 answer.

13 THE WITNESS: In my discussions with my
14 counterparts at RFC, they always asked did you run it
15 through Assetwise approval; and if so, what did it tell you.

16 THE COURT: All right. Now.

17 MS. WINTER: Objection, hearsay with respect to
18 his testimony as to what RFC told him.

19 MR. CLOUSER: Your Honor, it goes to the effect on
20 the listener. RFC is communicating to PRMI via Mr. Crawford
21 and their statements to him influence his understanding of
22 the system. It's the effect on the listener.

23 THE COURT: So you're not -- you don't think the
24 Court should consider this evidence for the truth of the
25 matter asserted?

1 MR. CLOUSER: The Court should consider the
2 evidence for the effect on the listener. In addition, it is
3 non-hearsay under 801(d)(2)(D) because the people that he is
4 talking about are employees of RFC speaking in connection
5 with their employment as they interact with Mr. Crawford in
6 his role as secondary marketing manager.

7 THE COURT: Meaning that every employee of RFC
8 binds RFC?

9 MR. CLOUSER: No. Meaning that the Court can
10 accept it for the truth as non-hearsay.

11 MS. WINTER: May I respond, Your Honor?

12 THE COURT: Any employee -- I'm sorry. Go ahead.

13 MS. WINTER: With respect to the argument that
14 it's not hearsay under 801(d)(2), Your Honor, Mr. Crawford
15 has not identified any specific by name or even title, so we
16 don't know who the employee is, whether they were acting
17 within the scope of their agency. And the Eighth Circuit
18 has recognized that in this instance a statement by an
19 unknown author is not admissible as an admission by a
20 party-opponent and that's from the *Cedeck vs. Hamiltonian*
21 *Federal Savings and Loan Association* case, 551 F.2d. 1136 at
22 page 1138 from 1977.

23 THE COURT: You don't disagree with that law, do
24 you?

25 MR. CLOUSER: I don't disagree with that law, Your

1 Honor. May I ask Mr. Crawford a follow-up question about
2 the individuals with whom he recalls speaking?

3 THE COURT: He would have to have a specific
4 recollection of a conversation with a specific individual
5 and the time and all that, not just generally we talked
6 about. But you may ask, yes.

7 So are you moving on, then?

8 MR. CLOUSER: I am going to move on, Your Honor.

9 THE COURT: All right. Then just for the record,
10 I will permit the testimony, but not for the truth of the
11 matter asserted.

12 Go ahead.

13 MR. CLOUSER: Thank you, Your Honor.

14 BY MR. CLOUSER:

15 Q. Mr. Crawford, just to refresh, you testified that you
16 recall people asking you did you use Assetwise Direct and
17 what did Assetwise Direct say. Is that a fair recollection
18 of your testimony?

19 MS. WINTER: Objection, hearsay.

20 THE COURT: Okay. What people? What are we
21 talking about here. People generally or RFC people?

22 MR. CLOUSER: Sorry, Your Honor. My understanding
23 from Mr. Crawford's testimony is that he said that people at
24 RFC had said to him what did Assetwise -- did you use
25 Assetwise Direct and what did it say.

1 THE COURT: You may ask him if he has a specific
2 recollection of a specific conversation with someone he can
3 identify at RFC who specifically gave him an answer, but I
4 need to know who that person was and what their position was
5 to determine whether or not they would somehow bind RFC.

6 BY MR. CLOUSER:

7 Q. Mr. Crawford, whom do you recall communicating with at
8 RFC?

9 A. I typically spoke with folks like Renee Bangerter and
10 Lori Zaloumis and Tina Diehl.

11 Q. And do you remember what those individuals said to you
12 regarding Assetwise Direct?

13 THE COURT: No, there has to be -- not generally.
14 There needs to be a specific memory of a specific
15 conversation. You may ask him that question: Do you have a
16 specific memory of a specific conversation?

17 MR. CLOUSER: Your Honor, I'll move on.

18 THE COURT: Okay.

19 BY MR. CLOUSER:

20 Q. Mr. Crawford, do you recall RFC ever telling you that
21 PRMI should not use Assetwise Direct?

22 MS. WINTER: Objection, hearsay.

23 THE WITNESS: No.

24 THE COURT: All right. You can ask his
25 understanding of PRMI rules and what PRMI did, but unless

1 you identify someone at RFC who spoke with him who has the
2 authority to bind RFC, it's a hearsay question.

3 MR. CLOUSER: But, Your Honor, the answer was that
4 there was no such communication.

5 THE COURT: All right. You may go on. But I just
6 want to alert you your questions are raising the specter of
7 an inappropriate answer, so make sure you predicate them
8 with the right words.

9 MR. CLOUSER: Thank you, Your Honor. Your Honor,
10 I'd like to show the witness DTX-217.

11 THE COURT: DTX, right?

12 MR. CLOUSER: DTX-217. This has not been admitted
13 into evidence yet.

14 THE COURT: All right.

15 BY MR. CLOUSER:

16 Q. Mr. Crawford, do you have that document in front of you?

17 A. I do.

18 Q. And what is this document?

19 THE COURT: All right. Hold on. I don't have the
20 document. Did you give me all documents for direct
21 examination?

22 MR. CLOUSER: We did, Your Honor.

23 THE COURT: DTX-217 is not in my book. All right.
24 I have another copy.

25 MR. CLOUSER: Apologies, Your Honor.

1 THE COURT: You may go ahead.

2 BY MR. CLOUSER:

3 Q. What is this document, Mr. Crawford?

4 A. This is an e-mail from me to Tina on a loan scenario
5 where it looks like it was -- it fit their guidelines per
6 their matrix, but we couldn't get an Assetwise approval, so
7 I was asking for her help.

8 Q. Who is Tina Diehl?

9 A. I believe she was a sales assistant.

10 Q. A sales assistant where?

11 A. For RFC.

12 Q. And do you have any reason to doubt you sent or received
13 the e-mails in this document?

14 A. No.

15 MR. CLOUSER: Your Honor, PRMI moves DTX-217 into
16 evidence.

17 THE COURT: Any objection?

18 MS. WINTER: No objection.

19 THE COURT: DTX-217 is received into evidence.

20 BY MR. CLOUSER:

21 Q. Looking at the bottom of the e-mail in this chain, the
22 earliest in time, I think you were explaining what this
23 issue that you were raising was. Can you provide context.

24 A. Well, specifically it looks like we had a loan scenario
25 that we couldn't get approved in Assetwise and we weren't

1 sure why. It talks about the terms of the loan and
2 basically asking, you know, what was I missing, you know,
3 can you help me out with it.

4 Q. Why were you the one contacting RFC about this issue?

5 A. Well, it was normal for me to have discussions about
6 loans with RFC.

7 Q. And why was that normal, for you to have discussions
8 with RFC?

9 A. Well, part of my job responsibilities, any time someone
10 had a question, they would run it up the ladder to me and I
11 would contact RFC to try to get whatever issue it may be
12 resolved.

13 Q. And looking at this document, Ms. Diehl responded to
14 your original e-mail, correct?

15 A. Correct.

16 Q. And what was her response?

17 A. Her response was that it is currently on the matrix, but
18 has not been released in our Client Guide, therefore not yet
19 programmed into Assetwise.

20 Q. And you followed up with another question, correct?

21 A. I did. I asked her if we had to manually underwrite the
22 loan since we couldn't get an Assetwise approval.

23 Q. And Ms. Diehl responded yes, correct?

24 A. Correct.

25 Q. What did that tell you?

1 A. Well, it told me that the Client Guide and Assetwise
2 didn't match and that we had to underwrite this loan
3 manually.

4 Q. Did PRMI ordinarily manually underwrite loans for RFC?

5 A. No. By far and large, we ran everything through
6 Assetwise Direct to get Assetwise approvals on them.

7 Q. And do you recall whether PRMI had to pay a fee to use
8 Assetwise Direct?

9 A. I do. We paid \$300 a month.

10 Q. Were you required to pay that fee the whole time you
11 were using Assetwise Direct, to your recollection?

12 A. Yes.

13 MR. CLOUSER: I'd like to show the witness
14 DTX-257. This is not yet in evidence.

15 BY MR. CLOUSER:

16 Q. Mr. Crawford, do you recognize these documents?

17 A. I do. They are invoices from RFC.

18 Q. Would you have seen these invoices in your work as a
19 secondary marketing manager?

20 A. Yes.

21 Q. Flipping through this document, do you recognize any of
22 the handwriting on the document?

23 A. It's definitely my handwriting.

24 MR. CLOUSER: Your Honor, PRMI moves into evidence
25 DTX-257.

1 MS. WINTER: No objection.

2 THE COURT: DTX-257 is received into evidence.

3 BY MR. CLOUSER:

4 Q. Mr. Crawford, I'd like to take a look at DTX-257-39.

5 A. Okay.

6 Q. When is this invoice dated?

7 A. November 28th, 2001.

8 Q. And what is included in this invoice?

9 A. The Assetwise monthly fee and some recapture of
10 premiums.

11 Q. And at the bottom of this page there's some handwriting
12 that says, "Requested check 12-5-01." Do you see that?

13 A. I do.

14 Q. Is that your handwriting?

15 A. Yes, it is.

16 Q. All right. And turning to the next page, what is this
17 document?

18 A. This is the internal check request form that I gave to
19 our accounting department so they would pay that invoice.

20 Q. And did this check request include money for the
21 Assetwise Direct fee?

22 A. Yes, it did.

23 Q. Let's look at DTX-257-23.

24 A. Okay.

25 Q. When is this invoice dated?

1 A. July 29th, 2002.

2 Q. And what is this invoice for?

3 A. Again, the Assetwise monthly fee and premium recapture.

4 Q. Did PRMI pay the Assetwise Direct fee in connection with
5 this invoice?

6 A. Yes, they did.

7 Q. And let's look at one more, DTX-257-17.

8 A. Okay. I got it.

9 Q. When is this invoice dated?

10 A. July 27, 2004.

11 Q. And what is this invoice for?

12 A. The Assetwise Direct monthly fee and, again, premium
13 recapture.

14 Q. And did PRMI pay the Assetwise Direct fee in connection
15 with this invoice?

16 A. Yes, we did.

17 Q. Did RFC ever remove PRMI's access to Assetwise Direct
18 during your time as secondary marketing manager?

19 A. No.

20 Q. To your knowledge, did RFC ever stop invoicing PRMI the
21 \$300 monthly fee for PRMI's access to Assetwise Direct while
22 you were secondary marketing manager?

23 A. No.

24 Q. When you first started in the wholesale division at
25 PRMI, was RFC an important investor to your division?

1 A. RFC was our biggest investor.

2 Q. How long did RFC maintain the status as your biggest
3 investors in the wholesale division?

4 A. 2003, 2004, to the best I remember.

5 Q. And why did that change?

6 A. Countrywide came out and expanded their loan products
7 that they were offering and they were offering a higher
8 price for the pools that we were selling, so the production
9 moved from RFC to Countrywide.

10 Q. And when you said expanding its products, Countrywide
11 expanding its products, what did you mean by that?

12 A. I mean they were offering loan programs that would allow
13 us to reach more borrowers to build our business.

14 Q. Can you provide some examples?

15 A. They had programs that would allow customers to go to a
16 higher LTV, a lower FICO score, things like that.

17 Q. And what happened as a result of the changes Countrywide
18 was making?

19 A. Well, the result was the production moved from RFC to
20 Countrywide.

21 Q. And when you say, "the production," are you referring to
22 PRMI's production?

23 A. Yes, I am.

24 Q. How did RFC react to Countrywide's capture of market
25 share?

1 MS. WINTER: Objection, calls for hearsay.

2 THE COURT: It does. You'll have to ask that
3 question differently.

4 MR. CLOUSER: I'd like to show the witness
5 DTX-184. This has been already admitted into evidence.

6 THE WITNESS: Okay.

7 BY MR. CLOUSER:

8 Q. Mr. Crawford, what is this document?

9 A. This is an e-mail that I sent to RFC about a Countrywide
10 pool that we sold so they could look at it.

11 Q. And you sent this e-mail to Renee Popiolek; is that
12 correct?

13 A. Correct.

14 Q. Who is Renee Popiolek?

15 A. She was a sales director at RFC.

16 Q. Did Ms. Popiolek at some point leave RFC?

17 A. She did. 2005, I believe.

18 Q. And what happened after she left RFC?

19 A. I believe Lori Zaloumis took on her role.

20 Q. Looking back at this e-mail, when is this dated?

21 A. November 24th, 2004.

22 Q. And so at this time was Ms. Popiolek still the sales
23 director at RFC for PRMI?

24 A. I believe so, yes.

25 Q. And what's going on in this exchange with Ms. Bangerter?

1 A. This -- in this exchange it's just me offering Renee an
2 example of a pool that we sold to Countrywide to see if they
3 had any interest.

4 Q. And what was your understanding of why Ms. Bangerter was
5 asking for this information?

6 A. They were trying to win back our business, PRMI's
7 business.

8 Q. Were you offering this pool for RFC to bid on?

9 A. No. This pool had already been sold.

10 Q. Mr. Crawford, do you recall you were deposed in this
11 case a week ago or two weeks ago?

12 A. Yes, I do.

13 Q. Had you been deposed before?

14 A. No.

15 Q. Were you nervous at your deposition?

16 A. Sure. Very.

17 Q. Do you recall at your deposition being shown this
18 document?

19 A. I do.

20 Q. And what happened?

21 A. I mistook this for an e-mail that we actually sent to
22 RFC, you know, to bid on a pool, but I realized it and so I
23 brought it up back in my deposition.

24 Q. And are you confident today your recollection of this
25 e-mail that you have provided to the Court?

1 A. Yes.

2 Q. So let's take a quick look at the attachment, which is
3 DTX-184-3. What is this?

4 A. This was a copy of the pool that I sent so she could
5 take a look at it.

6 Q. Is there anything in this attachment that indicates this
7 pool was not intended for RFC?

8 A. Yeah, in the Notes section under number 1 it says, "All
9 loans underwritten to Countrywide guidelines."

10 Q. Anything else?

11 A. Well, it lacks the column with the Assetwise Direct
12 approval like we would send on the RFC bid tapes.

13 Q. At this time were you having ongoing discussions with
14 RFC about how RFC could win back product from PRMI?

15 A. Yeah, that was typical in all my discussions with RFC
16 throughout my time.

17 Q. Was there ever a time when RFC was able to get product
18 from PRMI that was originated for Countrywide?

19 A. There was one incident, yes.

20 Q. What do you recall about that instance?

21 A. Well, I recall that it was a one-off thing. Like I
22 mentioned before, our business practice was to originate,
23 close, and sell loans to a specific investor. This was the
24 first and only instance where we originated loans to one
25 investor guidelines and sold it to another investor.

1 Q. And do you recall approximately when this occurred?

2 A. Late 2005, I believe.

3 Q. And at that time was RFC still trying to win back
4 business from PRMI?

5 A. I believe so, yes.

6 MR. CLOUSER: Your Honor, I'd like to show the
7 witness DTX-227. This has not yet been admitted.

8 THE COURT: Okay.

9 BY MR. CLOUSER:

10 Q. Mr. Crawford, are you at that document?

11 A. I am.

12 Q. What is this document?

13 A. This is an e-mail that I sent to Lori Zaloumis just
14 telling her that it was good to see her yesterday and then
15 eventually asking her if she had interest in putting a bid
16 on a \$7 million pool underwritten to Countrywide guidelines.

17 Q. When is this e-mail dated?

18 A. This is dated October 20th, 2005.

19 Q. Do you have any reason to doubt that you sent and
20 received the e-mails in this chain?

21 A. No.

22 MR. CLOUSER: Your Honor, PRMI moves DTX-227 into
23 evidence.

24 MS. WINTER: No objection.

25 THE COURT: DTX-227 is received into evidence.

1 BY MR. CLOUSER:

2 Q. This e-mail mentions a visit. Did you regularly meet
3 with RFC sales directors?

4 A. Yeah, they typically visited our office quite often.

5 Q. And do you recall meeting with Ms. Zaloumis on
6 October 19th, 2005?

7 A. I do not.

8 Q. Do you have any reason to doubt that you met with
9 Ms. Zaloumis on that occasion?

10 A. No.

11 Q. In this e-mail you say, "Onto the serious stuff, I'd
12 like to extend an offer to you to see if RFC would like to
13 bid on a \$7 million pool underwritten to Countrywide's
14 guidelines." Do you see that?

15 A. I do.

16 Q. And what did you mean by that?

17 A. Exactly what it says, that we had a pool of loans that
18 were underwritten and closed to Countrywide guidelines and
19 to see if they had any interest in purchasing them.

20 Q. Earlier I think you mentioned this was a one-off type of
21 deal?

22 A. Correct. My recollection, this is the only time we ever
23 originated loans to one investor guidelines and sold them to
24 the other.

25 Q. And why was that uncommon?

1 A. Well, it was our normal business practice to originate
2 loans under an investor's guidelines with the intent of
3 selling that loan to that investor.

4 Q. And looking at this e-mail, Ms. Zaloumis responded to
5 you. Do you see that?

6 A. I do. She asked if they were subprime.

7 Q. And what did you understand from her response?

8 A. That they were interested in looking at this pool.

9 MR. CLOUSER: I'd like to show the witness
10 DTX-229. This has already been admitted.

11 THE COURT: Okay.

12 THE WITNESS: Okay. I have it.

13 BY MR. CLOUSER:

14 Q. Looking at the bottom e-mail in this chain, is that an
15 e-mail from you to Lori Zaloumis dated October 20th, 2005?

16 A. It is.

17 Q. And the timestamp on that e-mail is 5 o'clock p.m. Do
18 you see that?

19 A. I do.

20 Q. Was that e-mail -- so the previous document we looked
21 at, DTX-227, the timestamp is 4:41 p.m. Did you send this
22 bottom e-mail to Lori Zaloumis about 20 minutes after your
23 prior e-mail?

24 A. I did.

25 Q. And looking at the attachment to this document,

1 DTX-229-3, what is this?

2 A. This is an example of the bid tape or the pool of loans
3 with all the loan-level details.

4 Q. And is this different from the typical bid tapes that
5 you would send to RFC?

6 A. It is. This one -- because these loans were originated
7 and closed to Countrywide, you can see in the notes it says
8 that they were all loans -- or guidelines -- I can't read
9 it. Sorry. It's a little small. So it says, "All loans
10 underwritten to Countrywide."

11 Q. And why did you include that note at the bottom of the
12 tape, "all loans underwritten to Countrywide"?

13 A. Just so it was clear what type of loans that they were
14 buying.

15 Q. What do you recall about the communications with RFC on
16 this pool?

17 A. I don't recall having any more communication.

18 Q. Did RFC bid on this pool?

19 A. They did.

20 Q. And did RFC ultimately -- or did PRMI accept RFC's bid
21 on this pool?

22 A. We did.

23 Q. Did anyone at RFC ever say that RFC's Client Guide would
24 apply to these loans?

25 MS. WINTER: Objection, calls for hearsay.

1 THE COURT: Hold on just one second. You can ask
2 the question whether somebody, some executive, somebody with
3 authority at RFC, if he has a specific recollection of a
4 specific conversation. You have to ask --

5 BY MR. CLOUSER:

6 Q. Mr. Crawford, do you have any recollection of any
7 executive or anyone with authority from RFC telling you the
8 RFC Client Guide applied to these loans?

9 MS. WINTER: Objection. Same objection, Your
10 Honor.

11 THE COURT: Hold on one second. What is the
12 objection now?

13 MS. WINTER: Hearsay with respect to him
14 soliciting communications from RFC without identifying the
15 person, the place, the time.

16 THE COURT: Okay. I think he has to lead up to
17 that. So this is a "yes" or "no" question. If he says,
18 "Yes," then you need to identify the person, the place, the
19 time, all that. Okay?

20 MR. CLOUSER: Your Honor, I'd also note that
21 statements by RFC individuals to PRMI about this pool are
22 offered for the effect on the listener. It is PRMI's
23 understanding of the nature of the deal that was --

24 THE COURT: So you don't care whether this
25 evidence is accepted for the truth of the matter asserted?

1 MR. CLOUSER: I think it should be for both, but I
2 would -- I mean --

3 THE COURT: I don't understand what -- why it
4 matters what the effect is on the listener because the
5 argument is that there should be estoppel. So the question
6 is whether there is -- what do we have here?

7 THE CLERK: That's the Southern District of New
8 York.

9 THE COURT: Who is that?

10 THE CLERK: That's Dr. McCrary in the Southern
11 District of New York.

12 THE COURT: All right. Let's take a minute here
13 and make sure Dr. McCrary is taken off the screen. There we
14 go.

15 MR. CLOUSER: Your Honor, so the question I just
16 asked is a question about the absence of communication,
17 which is non-hearsay. So I think that may resolve any
18 objection.

19 THE COURT: The question you just asked is about
20 the absence of communication? I don't think you said -- all
21 right. Why don't you ask a different question.

22 MR. CLOUSER: Sure.

23 THE COURT: I mean, has he previously testified
24 that he never had any communication? Is that what you're
25 saying?

1 MR. CLOUSER: Yes, Your Honor.

2 THE COURT: So you can say is it true from your
3 prior testimony that.

4 BY MR. CLOUSER:

5 Q. Mr. Crawford, did you have any communications with RFC
6 regarding whether RFC's Client Guide -- strike that.

7 Mr. Crawford, did Ms. Zaloumis ever say to you
8 that the RFC Client Guide applied to this pool?

9 A. No.

10 Q. Did she ever say anything further to you about this pool
11 after RFC bid and PRMI accepted the bid?

12 A. No.

13 Q. Did anyone at RFC say that even though these loans were
14 Countrywide loans, RFC was only buying them pursuant to
15 RFC's Client Guide?

16 A. No.

17 Q. If someone had told you that, what would your reaction
18 have been?

19 MS. WINTER: Objection, calls for speculation.

20 THE COURT: It does. That's sustained.

21 BY MR. CLOUSER:

22 Q. We talked earlier about an example of a bulk
23 confirmation letter from RFC on an earlier pool. Do you
24 recall that?

25 A. I do.

1 Q. Did you ever receive a bulk confirmation letter from RFC
2 on this deal?

3 A. No, we did not.

4 Q. If someone from RFC told you that it was buying these
5 loans subject to the RFC Client Guide, is that something
6 that would have required your sign-off?

7 A. That would have required me to go to my boss.

8 Q. Is that something that would have had to come through
9 you?

10 A. Yeah, typically being the point person, you know, I
11 would be handling, you know, most of the discussions about
12 this.

13 Q. Mr. Crawford, what was your understanding of the
14 guidelines applicable to this pool?

15 A. I don't recall ever having a discussion about that.

16 Q. When you communicated to RFC, what did you communicate
17 to RFC about the guidelines applicable to this pool?

18 A. That these loans were originated and underwritten to
19 Countrywide guidelines.

20 Q. In connection with bulk pools, did RFC sometimes kick
21 certain loans out of a pool that it didn't want to buy?

22 A. That was typical. They would -- they would drop a few
23 loans. They would also pend loans so we could get documents
24 that they needed to get them comfortable and eventually have
25 them purchased.

1 Q. Do you recall if RFC pended or kicked loans from this
2 Countrywide pool?

3 A. I believe they did.

4 Q. Did RFC's decision to pend or kick loans from the
5 Countrywide pool affect your understanding of the applicable
6 guidelines to this pool?

7 A. No. Kicking loans out and pending loans is a normal
8 part of the process, but the deal was the deal and it was
9 that we were selling Countrywide loans that were
10 underwritten to Countrywide guidelines.

11 Q. Was it your understanding that the RFC Client Guide
12 applied in any way to this pool?

13 A. No.

14 Q. Did RFC ultimately purchase most of the loans in this
15 Countrywide pool?

16 A. I believe so, yes.

17 Q. Could RFC have unwound the deal after agreeing to the
18 bid?

19 A. I guess that's possible, but I've never seen that
20 happen. That would have been a huge, huge issue for us.

21 Q. And in this case, they didn't attempt to unwind the bid,
22 did they?

23 A. They did not.

24 Q. At some point you mentioned PRMI closed its wholesale
25 division, correct?

1 A. Correct.

2 Q. Did you decide to remain at PRMI?

3 A. I did.

4 Q. Why did you decide to remain at PRMI?

5 A. I enjoyed the people that I worked with and the company.

6 MR. CLOUSER: Thank you. No further questions,
7 Mr. Crawford.

8 THE COURT: Very good.

9 Counsel, you may proceed.

10 MS. WINTER: Good morning, Your Honor. Randi
11 Winter for Spencer Fane.

12 **CROSS EXAMINATION**

13 BY MS. WINTER:

14 Q. Good morning, Mr. Crawford. It's nice to see you again.

15 A. Good morning.

16 Q. I just want to make a couple things clear for the record
17 and make sure you're settled in there. Do you have three
18 binders of exhibits from our side that you have access to?

19 A. I do.

20 Q. Okay. And are there a few other people present in the
21 room with you there today?

22 A. There is.

23 Q. And is one of them Mr. Armstrong, who is PRMI's vice
24 president and associate general counsel?

25 A. It is.

1 Q. Are there also a couple of representatives -- or at
2 least one representative from our side, the plaintiff's
3 side, Mr. Anthony Quinn?

4 A. Yes.

5 Q. All right. Anyone else in the room?

6 A. No.

7 Q. Okay. Thank you. I'd like to start just by making sure
8 we're clear on dates of employment for you and your
9 involvement with RFC.

10 So I understand from your direct testimony that
11 you started at PRMI in July 2001?

12 A. Correct.

13 Q. And PRMI was already selling loans to RFC by that time,
14 right?

15 A. Correct, yes.

16 Q. So you were not involved, for example, in negotiating
17 either of the Client Contracts that PRMI had with RFC, those
18 predated your employment?

19 A. Correct.

20 Q. And both of those contracts are contracts you don't have
21 memory of ever reviewing during the course of your
22 employment at PRMI?

23 A. Correct.

24 Q. So you have no personal knowledge of PRMI's obligations
25 under either of those contracts?

1 A. That's correct.

2 Q. And you have no memory of ever discussing either of
3 those contracts with anyone at PRMI or anyone at RFC?

4 A. I cannot remember a specific time, no.

5 Q. Now, in your own words, you were not the reps and
6 warrants guy at PRMI; is that right?

7 A. That's correct.

8 Q. And when you say you're not the reps and warrants guy,
9 you're referring to the fact that you did not negotiate
10 representations and warranties on behalf of the company?

11 A. Correct.

12 Q. Nor did you participate in any sort of contract talks?

13 A. That's correct.

14 Q. And you never had a discussion with anyone about what
15 representations and warranties applied to any of the loans
16 that PRMI sold to RFC during the course of your employment,
17 right?

18 A. That is correct.

19 Q. And you also, though, have no idea who was the reps and
20 warrants guy at PRMI during the time period it was selling
21 loans to RFC?

22 A. Well, I understood that it would have been my boss or
23 Dave Zitting, you know, the CEO.

24 Q. Mr. Crawford, I took your deposition about three weeks
25 ago, right?

1 A. Yes.

2 Q. And in front of you there should be a spiral-bound
3 notebook marked PTX-458, which is your deposition
4 transcript. Do you have that handy?

5 A. I do.

6 Q. All right. If you could turn to the page that has the
7 stamp 458-51 on the bottom.

8 A. I've got it.

9 Q. And do you recall that I asked you during your
10 deposition who was the representations and warranties guy at
11 PRMI, right?

12 A. Yes.

13 Q. And if you look at the lines on page 199, 17 to 24, I
14 first asked you:

15 "Question. A couple times today you referenced the fact
16 that you're not the rep and warrant guy at PRMI, right?"

17 And your answer was: "Correct."

18 And then I asked you: Back in this timeframe when RFC
19 and PRMI were doing business, who do you view as the reps
20 and warrants guy at PRMI?"

21 And your answer there was: "I would have no idea."

22 Did I read that correctly?

23 A. You did.

24 Q. I'd like to discuss with you now your knowledge of
25 PRMI's use of selling loans to RFC using Assetwise. Okay?

1 A. Okay.

2 Q. While working at PRMI, as you mentioned on direct, you
3 never had any underwriting responsibilities, right?

4 A. Right.

5 Q. And you never input information into Assetwise yourself?

6 A. Correct.

7 Q. In fact, you never personally used Assetwise at all?

8 A. Correct.

9 Q. But despite your lack of direct involvement with
10 Assetwise, you did understand there were certain steps that
11 a PRMI underwriter needed to take before inputting
12 information into Assetwise?

13 A. Correct.

14 Q. For example, an underwriter would need to figure out how
15 to calculate a borrower's income because Assetwise wasn't
16 capable of doing that, right?

17 A. That's right.

18 Q. And the same is true with respect to assets. Assetwise
19 was not capable of accurately calculating a borrower's
20 assets on its own?

21 A. Correct.

22 Q. And PRMI was responsible for making sure all of the
23 information it put into Assetwise was accurate?

24 A. Correct.

25 Q. Because the Assetwise system was relying on that

1 information to be accurate in order to issue a decision on
2 whether RFC was interested in purchasing that loan?

3 A. Yes.

4 Q. And having never used Assetwise yourself, though, you're
5 unsure whether PRMI could rely on an Assetwise approval if
6 the information PRMI put into Assetwise was wrong to begin
7 with?

8 A. I'm sorry. Can you repeat that?

9 Q. Sure. You are unsure, having not used Assetwise
10 yourself, whether PRMI could rely on an Assetwise approval
11 if the information PRMI put into the system was wrong to
12 begin with?

13 A. If I understand your question, I mean, I do know that if
14 the information was put in accurately, that we could rely on
15 the approval. But it makes total sense if the information
16 was input incorrectly, that that approval wouldn't apply.

17 Q. Okay. Thank you.

18 Now I'd like to talk to you now about your
19 recollection of communications with RFC about Assetwise.
20 All right?

21 A. Okay.

22 Q. And you can't identify any specific person from RFC who
23 ever told you that PRMI was required to run all loans
24 through Assetwise?

25 A. I could not put a specific time, place, or person, no.

1 Q. You don't recall ever discussing with RFC what
2 representations and warranties applied to the loans that
3 were run through Assetwise?

4 A. I never had that discussion, no.

5 Q. You never shared your beliefs regarding what
6 representations and warranties you thought applied to loans
7 run through Assetwise with RFC, did you?

8 A. No, it was my understanding that anything that was run
9 through Assetwise would apply to RFC's guides.

10 Q. And you had that understanding based on conversations
11 with PRMI management?

12 A. Yes.

13 Q. You're not aware of anyone else at PRMI ever sharing
14 their beliefs with RFC about what reps and warrants applied
15 to Assetwise loans?

16 MR. CLOUSER: Objection, speculation.

17 THE COURT: Overruled.

18 THE WITNESS: Correct.

19 BY MS. WINTER:

20 Q. Now, no one at RFC ever represented to you that loans
21 approved by Assetwise were subject to a streamlined set of
22 reps and warrants, did they?

23 A. They did not.

24 Q. And no one ever stated from RFC that PRMI would be
25 protected if they ran all loans through Assetwise?

1 A. No. It was just my understanding that as long as we ran
2 it through Assetwise and we input the information correctly,
3 that we could rely on that Assetwise approval and satisfy
4 the Client Guide.

5 Q. That was your understanding, but you don't have any
6 specific recollection of any specific person from RFC who
7 ever made that representation to you, right?

8 A. Correct.

9 Q. No one from RFC represented to you ever that certain
10 provisions of the Client Guide were inapplicable to
11 Assetwise loans?

12 A. Not that I recall.

13 Q. And you're not aware of any documents that exist
14 anywhere where RFC represented to PRMI that certain
15 provisions of the Client Guide would not apply to Assetwise
16 loans?

17 A. Not that I recall.

18 Q. And the same is true with respect to the AlterNet Seller
19 Guide. You're not aware of any documents that exist
20 anywhere where RFC indicated that the AlterNet Seller Guide
21 provisions would not apply to Assetwise loans?

22 MR. CLOUSER: Objection, foundation.

23 THE COURT: Wait a minute. It sounds like she's
24 just reading from his deposition.

25 MR. CLOUSER: Also, I think there was an

1 inconsistency in the names of the companies.

2 THE COURT: Why don't you ask the question again.

3 MS. WINTER: I can rephrase, Your Honor.

4 BY MR. WINTER:

5 Q. Mr. Crawford, are you familiar with the AlterNet Seller
6 Guide that RFC published for a time period?

7 MR. CLOUSER: Objection, foundation. He wasn't at
8 the company at the time.

9 THE COURT: She's asking whether he was aware.
10 She's trying to lay the foundation.

11 You may proceed. You may answer the question,
12 Mr. Crawford.

13 THE WITNESS: I was aware of it.

14 BY MS. WINTER:

15 Q. And you're not, though, aware of documents that exist
16 where someone from RFC represented the provisions of that
17 AlterNet Seller Guide would not apply to Assetwise loans?

18 A. I am not aware of.

19 Q. No one from RFC ever stated to you that an Assetwise
20 approval superseded the AlterNet Guide or the Client Guide?

21 A. I cannot recall any specific person, no.

22 Q. Similarly, you don't recall any specific conversations
23 with any specific RFC representatives where they told you to
24 use Assetwise because the Client Guide was outdated?

25 A. I cannot remember any specific person, place, or time.

1 Q. Let's shift gears a bit and talk about the RFC Client
2 Guide.

3 Mr. Crawford, was it your understanding that
4 certain RFC loan programs were not available in the paper
5 Client Guide and were only available in Assetwise?

6 A. That was my understanding.

7 Q. And which ones do you recall only being available in
8 Assetwise but not the Client Guide?

9 A. Oh, I couldn't remember. It's been too long. Sorry.

10 Q. That's okay. Not expecting you to.

11 Now, I know you were not present for his
12 testimony, but earlier in the trial Mr. Zitting testified
13 that RFC's Home Solutions product was not published in the
14 RFC Guide. Does that refresh your recollection at all
15 personally as to whether you remember that one being in the
16 Guide?

17 A. It does not.

18 Q. How about the Payment Option ARM program, do you recall
19 one way or the other whether that one was in the Guide?

20 A. I do not recall.

21 Q. In your third volume you have handy there, there's a
22 previously admitted exhibit, PTX-1052.

23 A. Okay.

24 Q. Let me know when you've gotten to it.

25 A. I've got it.

1 Q. Okay. And you're at tab 1052? It's probably the very
2 last one in the binder.

3 A. Okay. I've got it.

4 Q. Do you recognize this Exhibit PTX-1052 as an example of
5 an RFC Client Guide?

6 A. I do.

7 Q. If I could have you turn to page 1052-35.

8 A. Okay.

9 Q. Do you see that this section is titled 2A,
10 Representations, Warranties, and Covenants?

11 A. I see that.

12 Q. And am I correct that you have no specific recollection
13 of ever discussing this provision of the Client Guide with
14 anyone at RFC or PRMI?

15 A. Correct.

16 Q. And you do not personally recall ever considering
17 whether any of the representations and warranties outlined
18 in this chapter of the Client Guide apply to the loans that
19 PRMI sold to RFC?

20 A. Correct. I've never looked at this.

21 Q. Now, I know you've testified you were not the reps and
22 warrants guy at PRMI, but you were nevertheless aware during
23 this time period that there were certain representations and
24 warranties that were standard in the industry, right?

25 A. Correct.

1 Q. For example, a prohibition on fraud and
2 misrepresentation is an industry standard rep and warrant
3 that all investors required as a general business practice,
4 right?

5 A. Yes.

6 MR. CLOUSER: Objection, foundation.

7 THE COURT: Overruled.

8 BY MS. WINTER:

9 Q. And a prohibition on fraud and misrep in origination was
10 an industry standard misrep for both loans submitted through
11 an automated underwriting system like Assetwise as well as
12 loans submitted outside an automated underwriting system,
13 right?

14 A. Right.

15 Q. If you could turn to page 1052-49, at the top of that
16 page there's a subdivision KK, No Fraud or
17 Misrepresentation. Are you with me there?

18 A. I am.

19 Q. And is this an example of an investor requiring a
20 representation and warranty that there was no fraud or
21 misrep in the origination of a loan?

22 A. I don't know because I never looked at this.

23 Q. All right. You've never -- you don't recall any
24 investor ever being willing to buy loans without an
25 assurance from PRMI that there was no fraud or misrep in the

1 origination of the loan, right?

2 A. True, yes.

3 Q. And you can't think of any set of investor guidelines
4 that would permit misrepresentation in the origination of a
5 loan?

6 A. No.

7 Q. If you could turn to page 1052-325.

8 A. Okay.

9 Q. This chapter is titled Payment Option Loan Program. Do
10 you see that there at the top?

11 A. I do.

12 Q. Does this refresh your recollection as to whether the
13 Payment Option Loan Program was published in the RFC Client
14 Guide?

15 A. It does not.

16 Q. We'll do the same thing quickly with page 347. If you
17 could turn to that page.

18 A. I'm there.

19 Q. And does this chapter titled Home Solution Loan Program
20 refresh your recollection as to whether that program was
21 published in the printed RFC Client Guide?

22 A. It does not.

23 Q. If you could look in the same binder you're in now,
24 Volume 3, at PTX-361, which is already admitted.

25 A. Okay.

1 (Pause in proceedings.)

2 THE WITNESS: Okay. Sorry. I think I'm there
3 now.

4 BY MS. WINTER:

5 Q. All right. Does the first page of this Exhibit at 361
6 reflect an e-mail to you and several other individuals from
7 an RFC sales associate Lora Dunlap?

8 A. Yes.

9 Q. The subject line of this e-mail was "GMAC-RFC Client
10 Guide Update"?

11 A. Correct.

12 Q. And one of the other individuals she copied on this
13 e-mail was your boss, Scott Peterson?

14 A. Correct.

15 Q. And you agree that in this e-mail RFC was transmitting
16 to you and Mr. Peterson updates to the RFC Client Guide?

17 A. Correct.

18 Q. It also indicates here that, if you wanted, you could
19 access the Client Guide and these updates through RFC's
20 Internet portal?

21 A. Yes, correct.

22 Q. But as I understand it, you don't recall whether, in
23 fact, you ever actually did access RFC's Client Guide
24 online?

25 A. No, I do remember. In my job duties I didn't need to

1 access it, so, yeah, I never looked at the Client Guide.

2 Q. If you could turn to page 361-48.

3 A. Okay.

4 Q. This chapter is titled 4(a) Assetwise. Do you see that
5 at the top?

6 A. I do.

7 Q. And the second section is titled Client Responsibilities
8 and Exclusions?

9 A. I see that.

10 Q. The first sentence under that section states, "Approved
11 GMAC-RFC clients are still bound by the representations and
12 warranties as detailed in this Client Guide." Correct?

13 A. I see that, yes.

14 Q. And so at least as of March 9th, 2004, when RFC sent you
15 the e-mail attaching this chapter of the Guide, RFC was
16 communicating its expectation that PRMI was still bound by
17 the reps and warrants in the Client Guide for Assetwise
18 loans, right?

19 MR. CLOUSER: Objection, Your Honor.

20 THE COURT: What's the basis of the objection?

21 MR. CLOUSER: Speculation as to what RFC was
22 doing.

23 THE COURT: Overruled.

24 THE WITNESS: Well, not ever accessing the Client
25 Guide, you know, I didn't pay attention to that. It was

1 always my understanding that if we had Assetwise approval,
2 it met the client's requirements.

3 BY MS. WINTER:

4 Q. So having not accessed the Client Guide, you didn't pay
5 attention to this communication from RFC in March of 2004
6 telling you that the Client Guide's reps and warrants still
7 applied to Assetwise loans?

8 A. I did not look at that, no.

9 Q. The next paragraph of this section A-401 states,
10 "Additionally use of Assetwise does not relieve clients of
11 loan eligibility and underwriting requirements set forth in
12 this Client Guide." Right?

13 A. Yes.

14 Q. And you never had any discussions with anyone at PRMI
15 about whether that language was inconsistent with your
16 understanding of the parties' business relationship, right?

17 A. Correct. It was always my understanding that we could
18 rely on the Assetwise Direct certificate.

19 Q. And for that same reason, you never had any discussions
20 with RFC indicating you believed this language was
21 inconsistent with your business understanding?

22 A. Not specifically to this.

23 Q. If you could turn to the next page, it's 361-49.

24 A. Okay.

25 Q. You'll see under section 402 here, subdivision A2 has a

1 statement that reads, "The loan must conform to program
2 criteria underwriting and loan eligibility requirements.
3 Assetwise provides program eligibility grading and slotting.
4 Clients are responsible to ensure the loan conforms to
5 GMAC-RFC Client Guides." Right?

6 A. I do see that.

7 Q. So here on a March 2004 e-mail RFC is again conveying to
8 PRMI that while Assetwise does program eligibility, grading
9 and slotting, like you mentioned in your testimony earlier
10 today, PRMI nevertheless remained responsible to make sure
11 the loan conformed with RFC's guidelines?

12 A. It was my understanding that we did so by having an
13 Assetwise Direct approval.

14 Q. You never discussed this provision with anyone at RFC or
15 PRMI?

16 A. Not specifically, no.

17 Q. You can put that one away. Thank you, Mr. Crawford.

18 I'd like to talk to you next about the bulk
19 process of selling loans to RFC, which you covered some in
20 your direct testimony.

21 A. Okay.

22 Q. I just want to make sure I have this understanding
23 correct. So from July 2001, when you started, until the
24 wholesale division closed in 2006, it sold subprime loans to
25 RFC?

1 A. Correct.

2 Q. And as you mentioned, PRMI had a separate retail
3 provision -- or division, excuse me, that sold prime loans.
4 You don't recall the retail division actually selling loans
5 to RFC in that time period?

6 MR. CLOUSER: Objection, foundation.

7 THE COURT: Well, I think the question is whether
8 he recollects. You may answer the question.

9 THE WITNESS: I don't recall.

10 BY MS. WINTER:

11 Q. And as you mentioned on direct, one of your primary
12 responsibilities in secondary marketing in the wholesale
13 division was to take loans that were already closed and
14 funded, package them up and sell them to an investor like
15 RFC in bulk?

16 A. Correct.

17 Q. And you oversaw two secondary marketing assistants, A.J.
18 Swope and Rob Plehn, whose primary functions were to make
19 sure the loans were shipped and delivered to investors and
20 to follow up with the investors to resolve any pend items?

21 A. Yes, that's correct.

22 Q. And so on direct you looked at PTX-025, which was an
23 example of one of your secondary marketing assistants
24 sending a bid tape offering a pool of loans to RFC, right?

25 A. Right.

1 Q. And then you said if RFC was interested in bidding on
2 the pool of loans, they would send back an e-mail attaching
3 a bulk confirmation letter?

4 A. Well, they would offer the bid and if we accepted it,
5 then they would send the bulk confirmation letter.

6 Q. And you looked at one of those on your direct at
7 PTX-026, right?

8 A. Right.

9 Q. Okay. Now, I apologize because I think this is going to
10 be a little bit tedious, but we can probably do it
11 expeditiously. I just want to have you confirm a couple
12 more examples of those bid tapes and bulk confirmation
13 letter transactions so that we can admit them into evidence.
14 All right?

15 A. Okay.

16 Q. So the first one I'll have you turn to is PTX-038, which
17 is in Volume 3.

18 A. I'm sorry. PTX what?

19 Q. 038.

20 A. This starts at 39.

21 (Discussion off the record.)

22 A. Give me a second. They make these too hard. What were
23 you saying about expediting this? Okay. I believe I'm
24 there.

25 Q. All right. When you have a chance to review it, could

1 you confirm that PTX-038 is another example of one of your
2 secondary marketing assistants offering a pool of loans to
3 RFC by e-mail?

4 A. It is, yes.

5 Q. And the subject line there says, "Forward PRMI bulk
6 number 51." Am I correct that the number 51 reference is
7 reflecting the fact that this is the 51st pool of loans that
8 PRMI has offered to RFC?

9 A. That would be correct, yes.

10 Q. And, again, like the one you reviewed on your direct at
11 PTX-025, the attachment to that e-mail is the bid tape with
12 all the loan characteristics for the loans in that pool?

13 A. Correct.

14 Q. And on direct you alluded to the fact that there was a
15 column typically on these bid tapes. In this instance it's
16 the last column on the final page of the spreadsheet
17 indicating whether or not PRMI had Assetwise approvals for
18 the loans in the pool?

19 A. Yes, that's correct.

20 Q. And if it indicates "yes" for each loan, that's
21 confirming there was, in fact, an Assetwise approval?

22 A. Yes, correct.

23 Q. If you could turn to the next Exhibit, PTX-39.

24 THE COURT: Do you want to seek to admit the
25 exhibit?

1 MS. WINTER: Yes, Your Honor, I was going to do it
2 in combination with the next one since they are related, but
3 I certainly can.

4 THE COURT: I think we better do them one at a
5 time.

6 MS. WINTER: Your Honor, plaintiff offers PTX-38
7 into evidence.

8 THE COURT: Any objection?

9 MR. CLOUSER: No objection, Your Honor.

10 THE COURT: PTX-38 is received into evidence.

11 BY MS. WINTER:

12 Q. Mr. Crawford, are you ready with me at PTX-39?

13 A. I am.

14 Q. And is this another example of RFC transmitting back a
15 bulk confirmation letter providing purchase details for its
16 offer to buy this pool of loans?

17 A. I believe so, yeah.

18 Q. And if you look at the bulk confirmation letter itself,
19 which is at 39-2, it similarly has the same language that
20 Mr. Clouser asked you about on direct, reflecting the fact
21 that RFC was agreeing to purchase this pool provided they
22 meet the requirements of the GMAC-RFC Client Guide and are
23 of investment quality, right?

24 A. Right.

25 MS. WINTER: Your Honor, plaintiff moves PTX-39

1 into evidence.

2 THE COURT: Any objection?

3 MR. CLOUSER: No objection, Your Honor.

4 THE COURT: PTX-39 is received into evidence.

5 BY MS. WINTER:

6 Q. Mr. Crawford, we're going to do this two more times.

7 MS. WINTER: And, in fact, if it's fine with the
8 Court and opposing counsel, I could just read the numbers of
9 the exhibits and have him confirm they are bid tapes and
10 confirmation letters before offering them.

11 THE COURT: Sure.

12 MR. CLOUSER: Okay.

13 BY MS. WINTER:

14 Q. So the ones I'll have you look at, Mr. Crawford, are
15 PTX-41 with its related response at PTX-42.

16 A. I'm sorry. The second one was PTX?

17 Q. 42.

18 A. Not 042?

19 Q. Yeah, it might have a zero in front of it.

20 A. Sorry. I have it now. Okay.

21 Q. Are PTX-41 and PTX-42 another instance where PRMI
22 offered a pool of loans to RFC and then RFC confirmed its
23 interest in purchasing vis-a-vis a bulk confirmation letter?

24 A. Yeah, I believe so.

25 Q. And one last time I'll have you do the same thing with

1 respect to the exhibits at PTX-29, 029, and PTX-030.

2 A. Yeah.

3 Q. Again, are those instances where PRMI is offering a bulk
4 pool and RFC is demonstrating its interest to purchase with
5 a bulk confirmation letter?

6 A. Yes.

7 MS. WINTER: Your Honor, plaintiff would move into
8 evidence PTX-029, PTX-030, PTX-041, and PTX-042.

9 THE COURT: Any objection?

10 MR. CLOUSER: No objection, Your Honor.

11 THE COURT: PTX-029, PTX-030, PTX-041, and PTX-042
12 are received into evidence.

13 BY MS. WINTER:

14 Q. Now, Mr. Crawford, we've looked at some of these
15 transactions where PRMI offered a bid tape, RFC sent back a
16 bulk confirmation letter. Do you recall there coming a
17 point in time in the parties' relationship in the 2004
18 timeframe when RFC stopped sending bulk confirmation letters
19 back when it accepted loans in a bulk pool?

20 A. I don't recall that ever happening, no.

21 Q. Do you recall one way or the other whether it did or
22 didn't happen?

23 A. No, I believe we got confirmation letters on all their
24 bulk pools.

25 Q. Have you -- well, strike that.

1 Do you have any memory as you sit here today in
2 court ever actually reviewing a bulk confirmation letter
3 received from RFC in or after 2004?

4 A. I cannot remember a specific instance, no.

5 Q. But PRMI did still sell bulk pools of loans to RFC in
6 2004 and 2005?

7 A. Correct.

8 MS. WINTER: Your Honor, I'm moving on to another
9 topic. I'm happy to continue, but if it's appropriate time
10 for a morning break --

11 THE COURT: Okay. Just for the sake of the folks
12 in New York, about how much time do you predict you have
13 left?

14 MS. WINTER: Maybe 15 minutes.

15 THE COURT: All right. Okay. We will take a
16 15-minute break. It's about 10:40. We will resume in
17 15 minutes. I would ask that the New York folks be updated
18 on our schedule. Court is briefly adjourned.

19 (Recess taken at 10:42 a.m.)

20 * * * * *

21 (10:59 a.m.)

22 **IN OPEN COURT**

23 THE COURT: Ms. Winter, you may proceed.

24 MS. WINTER: Thank you, Your Honor.

25 BY MS. WINTER:

1 Q. Mr. Crawford, I'd like to talk to you about the pool of
2 Countrywide loans sold to RFC now. All right?

3 A. Okay.

4 Q. As mentioned on your direct today, as of the date of
5 your deposition about three weeks ago your recollection was
6 that you sold that Countrywide pool to RFC Sales Director
7 Renee Bangerter?

8 A. I believe it was sold to Lori Zaloumis.

9 Q. But your recall three weeks ago was that you had sold it
10 to Ms. Bangerter?

11 A. I did mix that up back then.

12 Q. If you would look in Volume 1 in front of you, we're
13 going to take a look again at DTX-184, which you discussed
14 with Mr. Clouser.

15 A. Okay. I got it.

16 Q. Okay. So this is the e-mail where you at least at the
17 time of your deposition thought you were offering a
18 Countrywide pool to RFC for sale through Ms. Bangerter,
19 right?

20 A. This is the one I mixed up, yeah.

21 Q. And you have confirmed today that testimony was
22 inaccurate?

23 A. Yes.

24 Q. The reason your testimony was inaccurate is because you
25 can't remember any of the specifics of the transaction where

1 RFC purchased a pool of loans underwritten to Countrywide
2 guidelines, right?

3 A. Repeat that. I'm sorry. I missed the question.

4 Q. You can't remember any of the specifics of the
5 transaction where RFC purchased a pool of loans underwritten
6 to Countrywide guidelines?

7 A. No, I can remember some of the things.

8 Q. What you can remember is offering the pool and RFC
9 eventually purchasing it?

10 A. In addition, I believe that there were discussions about
11 loans that were pended and kicked out of the pool.

12 Q. And you can't remember anything beyond that?

13 A. Not that I recall.

14 Q. On direct you testified that you are confident in your
15 recollection of this e-mail that you've provided to the
16 Court today, but the only thing you really remember about it
17 is that you sent it because RFC was looking to gain back
18 business?

19 A. Correct.

20 Q. And besides Ms. Bangerter, you do not have any specific
21 recollection of any conversations you had with any RFC
22 employees discussing RFC's interest in buying loans
23 underwritten to Countrywide guidelines?

24 A. Just the one instance where we sold them the loans.

25 Q. And by that you're referring to the actual e-mail where

1 you asked Ms. Zaloumis whether she was interested in having
2 RFC bid on a pool of Countrywide loans?

3 A. Correct.

4 Q. On direct you testified that Ms. Zaloumis never said
5 anything further to you about that pool of loans beyond what
6 was reflected in the e-mail. Do I have your testimony
7 accurate?

8 A. Yes, you do.

9 Q. But in truth, you don't recall one way or the other
10 whether you had additional conversations with Ms. Zaloumis
11 beyond what's reflected in the e-mails?

12 A. That would be correct.

13 Q. And after you offered the bulk pool to RFC, you turned
14 the bulk sale process over to your assistant, Mr. Plehn?

15 A. Correct.

16 Q. And you don't recall playing any further role in the
17 process of RFC buying those loans from that point forward?

18 A. Correct.

19 Q. However, you do recall Mr. Plehn making you aware of a
20 concern he had that RFC was kicking loans out of the pool
21 during its due diligence review for not complying with RFC's
22 guidelines?

23 A. Correct, I remember that.

24 Q. In the third volume I'm going to have you turn to
25 PTX-351, and this is an exhibit that's not yet admitted.

1 A. Okay. I'm there. Sorry. What was the number?

2 Q. 351. This is an e-mail from Tina Diehl at RFC to
3 another RFC employee, Sheila Lichty, copying Ms. Zaloumis,
4 dated November 3rd, 2005, right?

5 A. Correct.

6 Q. The subject line is "PRMI"?

7 A. Correct.

8 Q. And without reading it aloud, could you confirm whether
9 the first paragraph of this e-mail is consistent with your
10 recollection of Mr. Plehn's concern shared with you?

11 A. It does.

12 Q. And in her e-mail here Ms. Diehl then goes on to quote
13 an actual e-mail sent to her by Mr. Plehn, right?

14 MR. CLOUSER: Objection, Your Honor.

15 THE COURT: I'm sorry. Hold on. What's the
16 objection?

17 MR. CLOUSER: I thought she was asking to read it.

18 THE COURT: Are you withdrawing the objection?

19 MR. CLOUSER: I'm withdrawing the objection.

20 THE COURT: Very good.

21 BY MS. WINTER:

22 Q. Mr. Crawford, in her e-mail here Ms. Diehl quotes an
23 e-mail sent to her by Mr. Plehn, right?

24 A. It looks like that way, yes.

25 Q. And at the time you sent this e-mail Mr. Plehn was a

1 PRMI employee?

2 A. I believe so, yes.

3 MR. CLOUSER: Objection. This is double hearsay.
4 So the e-mail that is purporting to be quoted is in a layer
5 of hearsay.

6 THE COURT: All right. Have you offered the
7 e-mail yet?

8 MS. WINTER: I have not, Your Honor.

9 THE COURT: Let's do this in order. Are you going
10 to offer the e-mail or do you have more questions to ask of
11 the witness first?

12 MS. WINTER: I did want to lay some more
13 foundation for the exhibit first.

14 THE COURT: Why don't you do that.

15 BY MS. WINTER:

16 Q. So at the time you sent the e-mail that's quoted here,
17 Mr. Plehn was a PRMI employee, right?

18 A. I'm sorry. Did you say when I sent the e-mail?

19 Q. No. When Mr. Plehn sent the e-mail that Ms. Diehl is
20 quoting, he was a PRMI employee?

21 A. Oh, I believe so, yes.

22 Q. And the concerns he raised here were within the scope of
23 his PRMI employment, right?

24 A. Correct.

25 Q. And this e-mail refreshes your recollection regarding

1 Mr. Plehn's concerns about the Countrywide pool?

2 A. Yes.

3 Q. And if you turn to the attachment, it reflects the
4 reasons RFC had pended and declined certain loans in the
5 pool?

6 MR. CLOUSER: Objection, foundation.

7 THE COURT: Well, I think this is a problem. I
8 mean, I think you can use this e-mail to refresh his
9 recollection. But he wasn't a recipient of this e-mail and
10 so I'm not sure --

11 MS. WINTER: Sure, Your Honor.

12 THE COURT: -- he has a foundation to render
13 the -- to answer the question you asked.

14 MS. WINTER: Okay. May I attempt to establish the
15 exception to the hearsay rule that I think might apply to at
16 least parts of the e-mail?

17 THE COURT: Well, first of all, you'd have to
18 offer it. But the real question is do you first want to
19 explore his understanding of Mr. Plehn's -- is that how you
20 say it? -- Mr. Plehn's concerns?

21 MS. WINTER: Sure.

22 THE COURT: Because he can use the e-mail to
23 refresh his recollection even if the e-mail doesn't become
24 an exhibit.

25 MS. WINTER: Thank you, Your Honor.

1 BY MS. WINTER:

2 Q. Mr. Crawford, Mr. Plehn shared with you concerns that
3 RFC was declining loans in the pool because they did not
4 meet RFC guidelines as opposed to Countrywide guidelines,
5 right?

6 A. That's what I recall.

7 Q. And that's consistent with what's reflected in this
8 e-mail?

9 A. I believe so, yes.

10 Q. And you testified on direct examination that it was a
11 routine part of the process for RFC to pend loans when
12 buying them in bulk from PRMI and PRMI would then respond
13 and try to address the pend concerns, correct?

14 A. Correct.

15 Q. And is the attachment to this e-mail consistent with
16 that practice?

17 A. Correct.

18 MS. WINTER: Your Honor, plaintiff offers PTX-351
19 into evidence.

20 THE COURT: Why don't you explain how you get
21 around hearsay.

22 MS. WINTER: Sure. So the first paragraph of the
23 e-mail, Your Honor, is capturing Mr. Plehn's state of mind
24 regarding his concerns. And it's also plain from the
25 contents of the e-mail itself that it reflect Ms. Diehl's

1 present sense impression of an event or condition made as
2 she was perceiving it. So that part of the e-mail would
3 fall under 803.1 and 803.3.

4 The second part, which is the quote of Mr. Plehn's
5 e-mail itself, is not hearsay because Mr. Crawford has
6 confirmed that Mr. Plehn had these concerns and he had these
7 concerns in the scope of his agency as a PRMI employee.

8 And, finally, Mr. Crawford has laid foundation
9 establishing that the attachment reflecting the status of
10 loans that were pended and declined was a standard part of
11 the parties' bulk process and therefore falls under the
12 business record exception.

13 THE COURT: All right. Response, Mr. Clouser?

14 MR. CLOUSER: Your Honor, this is -- first, the
15 layer of hearsay that is Ms. Diehl's statements, counsel
16 said it fell under the present sense impression. There's no
17 indication in this e-mail that she's recording things that
18 she's observing as she is recording them, so it should not
19 fall under that exception. And so that -- they have not
20 established that this meets the second level of hearsay.

21 Additionally, this is an RFC document, so
22 Mr. Crawford cannot lay business records foundation for RFC.

23 THE COURT: All right. I think I agree with that.
24 The objection is sustained.

25 BY MS. WINTER:

1 Q. Turning to your testimony about the Countrywide pool
2 from your -- questions from Mr. Clouser, Mr. Crawford, you
3 never discussed with RFC the representations and warranties
4 that would apply to the Countrywide pool, right?

5 A. That is correct.

6 Q. And you're not aware of anyone else at PRMI, including
7 Mr. Plehn, for example, discussing the applicable
8 representations and warranties with RFC either, right?

9 A. Correct.

10 Q. And you never went back and consulted PRMI's contracts
11 with RFC to consider what they might say with respect to
12 what guidelines would govern loans that RFC was buying from
13 PRMI at that time?

14 A. I never had a discussion.

15 Q. You recall PRMI offering at least one additional
16 Countrywide pool to RFC after this one, right?

17 A. I believe so.

18 Q. And again if you could turn in your binder to an exhibit
19 that's not yet admitted, PTX-357.

20 A. Okay. I'm there.

21 Q. The first e-mail at the bottom of the first page is from
22 Mr. Plehn to several RFC employees and you're copied on it,
23 right?

24 A. Yes, correct.

25 Q. And the subject line is "Another Pool for Bid"?

1 A. Correct.

2 Q. Here Mr. Plehn is conveying PRMI's offer to RFC to bid
3 on another Countrywide pool of loans, right?

4 A. Correct.

5 Q. And he writes in here --

6 MS. WINTER: Actually, Your Honor, first I would
7 offer the exhibit into evidence.

8 MR. CLOUSER: Objection, Your Honor, to hearsay
9 for the top portion of the e-mail.

10 THE COURT: Which top portion?

11 MR. CLOUSER: So everything above that bottom-most
12 e-mail is hearsay and inadmissible.

13 MS. WINTER: Your Honor, the rest of the e-mail is
14 not being offered for the truth of the matter asserted.

15 THE COURT: It's not being?

16 MS. WINTER: No. It's truly just this bottom one.

17 THE COURT: Well, with that understanding --

18 MR. CLOUSER: Understood. No objection to the
19 bottom-most e-mail.

20 THE COURT: The lowest e-mail or the first e-mail
21 from Mr. Plehn, that portion of PTX-357 is received in
22 evidence. It does have an attachment to it. I presume
23 there's no objection to that?

24 MR. CLOUSER: No objection, Your Honor.

25 THE COURT: So that and the attachment are

received in evidence.

BY MS. WINTER:

Q. In his e-mail at the bottom of the first page Mr. Plehn indicates to RFC, "These are Countrywide loans and they have been underwritten to their guides. Let me know if you are able to make exceptions on some of these loans that may not fit exactly with your criteria." Did I read that correctly?

A. Yeah, I believe so.

Q. And you have no basis to dispute that Mr. Plehn had authority in his role as secondary marketing assistant to offer this pool to RFC under these circumstances?

A. Will you repeat that for me one more time?

Q. Mr. Plehn had authority in his role as a secondary marketing assistant to offer this pool to RFC under these circumstances, right?

A. Under what circumstances?

Q. That they had been underwritten to Countrywide guidelines and he's asking RFC if they would be able to make some exceptions for loans that did not meet RFC criteria.

A. So are you asking me if he had the authority to make exceptions? I guess I don't understand the question.

Q. Sure. I'm asking you if he had authority to offer the pool to RFC under the circumstances in that he understood he'd have to get exceptions from RFC for loans that did not meet RFC's criteria.

1 A. He had the authority to offer the pool. The whole
2 exceptions, I have no idea about that, though.

3 Q. Do you recall --

4 A. I don't know --

5 Q. I'm sorry. I didn't mean to interrupt you.

6 A. No, I was just going to say I don't recall exceptions
7 being made or, if you look at it on this side, they are
8 Countrywide loans underwritten to Countrywide guidelines.
9 They clearly aren't going to fit RFC guidelines. So if they
10 are going to purchase that, it would be our expectation that
11 they are purchasing that with the knowledge that they were
12 underwritten to a competing investor's guidelines.

13 So in that sense, they internally may have to make
14 exceptions, but Robb offering the pool, it was clearly
15 offered as a Countrywide pool with Countrywide loans
16 underwritten to Countrywide guidelines. I hope all that
17 rambling makes sense.

18 Q. It did. Thank you.

19 And, similarly, when you were on direct discussing
20 the pool that RFC actually bought, you indicated that it was
21 your recollection that they ended up buying fewer loans in
22 the pool than had been originally offered, right?

23 A. Yeah, it was typical that they would kick out some loans
24 and pend loans, that's true.

25 Q. And they did so in that instance?

1 A. Yes.

2 Q. On direct you testified about a packet of RFC invoices,
3 which are at DTX-257 in your first volume.

4 A. I'm sorry. DTX-357?

5 Q. 257.

6 A. Okay. I'm there.

7 Q. And you explained that these e-mails, some of them
8 reflect your approval for PRMI to pay RFC a charge for the
9 use of Assetwise. Am I right?

10 A. There weren't e-mails. They are invoices.

11 Q. I'm sorry. Yes, invoices. You were approving PRMI to
12 pay RFC invoices reflecting Assetwise fees?

13 A. Correct.

14 Q. And these invoices also reflect other charges from RFC
15 to PRMI for various premiums and fees?

16 A. Correct.

17 Q. You indicated the handwriting, for example, on the top
18 of the first few pages, that's your handwriting?

19 A. It is, yes.

20 Q. So, for example, that first page it's got a checkmark
21 and I think it reads, "Okay per Jim." Is that you
22 authorizing payment for the invoice?

23 A. Yes, it is.

24 Q. This first page, for example, reflects a different fee.
25 It's relating to a price premium recapture fee relating to a

1 loan.

2 A. Okay.

3 Q. Is that your understanding?

4 A. It looks that way, yeah.

5 Q. And you are aware that the loan on this invoice is from
6 the Countrywide pool that we have been discussing today that
7 RFC purchased from PRMI?

8 A. You did bring that up at my deposition, yes.

9 Q. And sitting here today three weeks later, you have no
10 basis to dispute that, do you?

11 A. No.

12 MR. CLOUSER: Objection, foundation.

13 THE COURT: Overruled.

14 BY MS. WINTER:

15 Q. And the reason you're able to confirm today that this is
16 a Countrywide pool loan is because the borrower and loan
17 information reflected in the invoice is also reflected in
18 the bid tape that you reviewed with Mr. Clouser earlier
19 today, for example, at DTX-229?

20 A. Correct.

21 Q. And am I correct that this price premium recapture
22 reflects an instance when a loan was paid off shortly after
23 the loan was purchased by RFC, so PRMI was paying back that
24 premium to RFC for the loan?

25 A. That is my recollection, yes.

1 Q. And if you could turn then to Volume 3, back to the
2 Client Guide exhibit at PTX-1052.

3 A. 1052. Okay. There.

4 Q. And when you're there, page 65.

5 A. Okay.

6 Q. This chapter is titled A216, Premium Recapture, right?

7 A. Yes.

8 Q. And on the next page, number 66, subdivision B has a
9 provision stating, "90-day recapture period for all other
10 loans," and it reads, "If any loan other than a bulk
11 AlterNet or credit GAAP loan or subset thereof pays off or
12 is liquidated within 90 days from its funding date, then
13 client must repay the entire original premium GMAC-RFC paid
14 for the loan."

15 That description is consistent with your
16 understanding of the premium price recapture fee reflected
17 on the invoice we just reviewed at DTX-257-1?

18 A. Are you asking if that loan falls within this particular
19 90-day period? Is that --

20 Q. Well, if the description of this fee and when it applies
21 that's outlined here in the Client Guide, if that's
22 consistent with your understanding of the premium fee
23 reflected on the invoice that you approved for payment on
24 the Countrywide loan.

25 A. Well, like I said before, I never opened the Client

1 Guide, so I can't tell. But I do clearly know that there
2 was a recapture policy that RFC had.

3 Q. And you agreed to follow that policy and pay that fee
4 with respect to this particular loan reflected at 257-1 from
5 the Countrywide pool?

6 A. I have no idea why I paid that invoice. There's too
7 many inconsistencies. There's some for longer than that
8 that were paid. So my answer is I don't know why I paid
9 that.

10 Q. To be fair, Mr. Crawford, I didn't ask you why you paid
11 it. I just asked for confirmation that you did indeed
12 approve that invoice for payment with respect to the fee
13 charged for the Countrywide loan. Is that right?

14 A. I did approve that, yes.

15 Q. And if you could then turn to page 570 in the same
16 exhibit of the Client Guide.

17 A. I'm there.

18 Q. This page has a definition for a servicing release
19 premium, which is a one-time premium paid to the client for
20 the servicing rights on a mortgage loan, correct?

21 A. If you say so. I've never looked at it.

22 Q. But that description of that servicing release premium
23 is consistent with the premium charged in the second invoice
24 at 257-2, which also related to Countrywide pool loans,
25 right?

1 MR. CLOUSER: Objection, foundation.

2 THE COURT: Well, let's see if he knows.

3 Overruled.

4 THE WITNESS: I don't understand the question.

5 BY MS. WINTER:

6 Q. Well, if you need to go back and refer, take a look
7 again at the invoices at DTX-257.

8 A. Okay. I got it.

9 Q. And specifically the invoice at 257-2 reflects a
10 servicing release premium that was charged by RFC to PRMI
11 for two loans, correct?

12 A. Correct.

13 Q. And you are aware that those are both loans from the
14 Countrywide pool that RFC purchased, right?

15 A. Yes, I believe so, yes.

16 Q. And, again, this is an invoice you approved for payment?

17 A. Correct.

18 Q. And the servicing release premium fee reflected on this
19 invoice is consistent with the description of that premium
20 we just reviewed in the RFC Client Guide?

21 A. But, like I said, you know, I didn't review the Client
22 Guide and I don't know the legalities of it, so I don't --
23 if you're asking was it paid off before 90 days, I would say
24 yes.

25 Q. I'm just asking if the definition in the Client Guide is

1 consistent with your understanding of what the servicing
2 release premium was back in this time period, not whether or
3 not it actually was from the Guide or applied.

4 A. I don't know.

5 Q. Do you have your deposition in front of you, the
6 transcript, PTX-458?

7 A. I've got it.

8 Q. If you could turn to page 74.

9 A. Okay.

10 Q. And specifically transcript page 293, lines 5 through 10
11 I asked you:

12 "Question: So is that definition there on page 4-476 of
13 the Client Guide defining the servicing release premium, is
14 that consistent with your understanding of the nature of
15 this charge?

16 "Answer: Yes, it is."

17 Did I read that correctly?

18 A. You did.

19 MS. WINTER: Nothing further, Your Honor.

20 THE COURT: Very good. Anything further,
21 Mr. Clouser?

22 MR. CLOUSER: Yes, brief redirect, Your Honor.

23 THE COURT: Okay.

24

25

REDIRECT EXAMINATION

BY MR. CLOUSER:

Q. Good morning again, Mr. Crawford.

A. Hello.

Q. Counsel had just asked you about premium recapture and servicing recapture fees. Do you recall those questions?

A. I do.

Q. Did all investors, to your knowledge, have premium recapture policies?

A. They did, yes.

Q. And did you routinely pay premium recapture invoices when any investor sent them to you?

A. Yes.

Q. You were asked on cross-examination about loan programs that were not in the RFC Client Guide. Do you recall those questions?

A. I do.

Q. And counsel showed you a copy of the RFC Client Guide at PTX-1052. Could you pull that out?

A. Okay. I've got 1052.

Q. And what's the date of this Client Guide?

A. It says effective July 22nd, 2005.

Q. Do you know what date PRMI started selling Home Solutions loans to RFC?

A. I don't remember specifically.

1 Q. And do you recall what date PRMI started selling POA,
2 Payment Option ARM, loans to RFC?

3 A. I believe, you know, 2005.

4 Q. Looking at page 1052-5, do you see at the bottom of that
5 page there's a subheading, Chapter 6, Payment Option Loan
6 Program?

7 A. I do.

8 Q. And right beneath that do you see that it says, "Added
9 Payment Option Program to Client Guide"?

10 A. I see that.

11 Q. Do you know one way or another whether PRMI was selling
12 Payment Option ARM loans to RFC prior to that date?

13 A. I don't recall.

14 Q. Are you aware of the dates and time periods included in
15 any agreements between PRMI and RFC concerning Payment
16 Option ARM loans?

17 A. Not that I recall, no.

18 Q. Counsel also showed you PTX -- strike that.

19 Are you aware of the dates and time periods
20 included in any agreements between PRMI and RFC concerning
21 Home Solution loans?

22 A. Not that I recall, no.

23 Q. Counsel asked you some questions about the
24 representations and warranties sections in this Client
25 Guide. Do you recall that?

1 A. I do.

2 Q. And counsel showed you page 1052-49. If you could turn
3 to that page.

4 A. Okay.

5 Q. And specifically counsel directed you to section KK. Do
6 you recall that?

7 A. I do.

8 Q. Do you see that in that section it refers to L Loans?

9 A. I do see that.

10 Q. All right. Please turn to page 1052-561 of the Client
11 Guide.

12 A. Okay. I'm there.

13 Q. And do you see the definition there for L Loan?

14 A. I do.

15 Q. It says -- it defines L Loans as a loan sold or intended
16 to be sold by the client to GMAC-RFC and that meets or is
17 intended to meet all the requirements of this Client Guide.
18 Do you see that?

19 A. I do.

20 Q. When you offered the pool of Countrywide loans to RFC,
21 were those loans intended to meet all the requirements of
22 the RFC Client Guide?

23 A. No. Those loans were originated and closed to meet the
24 Client Guide of Countrywide.

25 MR. CLOUSER: Thank you. No further questions.

1 THE COURT: Ms. Winter, anything further?

2 MS. WINTER: Nothing further, Your Honor.

3 THE COURT: Very good. All right. Mr. Crawford,
4 thank you very much. You are all done, sir.

5 THE WITNESS: Thanks everyone.

6 MR. CLOUSER: Thank you, Mr. Crawford.

7 THE COURT: All right. I think we should get
8 started on Dr. McCrary, so we'll take about 5 to 10 minutes,
9 whatever it takes to get him up there, and we'll come back
10 in a few minutes. Court is briefly adjourned.

11 One more thing. If we could have another copy of
12 the McCrary demonstratives, please. There was just one
13 copy. Thank you.

14 (Recess taken at 11:31 a.m.)

15 * * * * *

16 (11:44 a.m.)

17 **IN OPEN COURT**

18 THE COURT: Please be seated.

19 Good morning, Dr. McCrary. This is Judge Nelson.
20 Can you see me at the moment?

21 THE WITNESS: I can't. I can hear you. Now I can
22 see you actually. Hi.

23 THE COURT: Okay. Very good. Hi. If you would
24 raise your right hand, sir.

25 Do you swear in the testimony you're about to give

1 to tell the truth, the whole truth, and nothing but the
2 truth, so help you God?

3 THE WITNESS: I do.

4 THE COURT: Very good. Now we're going to switch
5 that screen over so that you can see Mr. Nicholson, who will
6 be asking you some questions, but I will be sitting here
7 listening to every word. Okay?

8 THE WITNESS: Okay. Thank you, Your Honor.

9 THE COURT: Very good. Mr. Nicholson.

10 **(Justin McCrary)**

11 **DIRECT EXAMINATION**

12 BY MR. NICHOLSON:

13 Q. Good morning, Dr. McCrary. For the record --

14 A. Good morning.

15 Q. -- Dr. McCrary, would you please tell me where you're
16 testifying from today.

17 A. I'm currently in the Southern District of New York
18 courthouse in Courtroom 15A, I believe.

19 Q. Okay. And so you're testifying via video conference?

20 A. Yes, that's correct.

21 Q. And can you hear me okay?

22 A. I can hear you fine. I don't know whether you can hear
23 me. I take it you'll let me know if I become inaudible.

24 Q. I will. Thank you. And can you see me okay as well?

25 A. Yes, I can.

1 Q. Okay. Thank you. And so if we have any issues today
2 with the connection and you can't see me or hear me, just
3 please let me know and we'll try to make the best of it.
4 Okay?

5 A. Understood.

6 Q. Now, Dr. McCrary, at a very high level, would you please
7 explain what you're here to -- well, I should say what
8 you're there in New York to testify about today.

9 A. Right. I was asked to review and respond to Dr. Snow's
10 sampling and damages methodology.

11 Q. Okay. And before we get into your opinions, I'd like to
12 ask you a few questions about your background.

13 What do you do for a living?

14 A. I teach. I'm a professor at Columbia Law.

15 Q. And are you involved in research there?

16 A. Yes.

17 Q. And what is the focus of your research?

18 A. I'm an economist by training. My work is empirical in
19 nature, which means I draw upon data. My work in particular
20 applies data to real-world problems. I would probably say
21 the bulk of my research has been centered on policing,
22 employment, anti-trust, and more recently securities
23 regulation.

24 Q. Okay. And in connection with your testimony today, have
25 you prepared a set of demonstrative slides?

1 A. I have.

2 Q. And I understand that we'll be pulling some of the
3 slides up today on the screen, but it may be a bit hard for
4 you to see them because they may be small. Do you have a
5 paper copy of your demonstrative slides with you just in
6 case?

7 A. I do. I have a paper copy here and there's also a clerk
8 from Quinn, who is here in the courtroom with me, and she
9 has a binder of those demonstratives as well.

10 Q. Great. Thank you.

11 And in particular, have you prepared a
12 demonstrative slide that summarizes your professional
13 experience?

14 A. I have.

15 MR. NICHOLSON: Geoff, could we pull up slide
16 DDX-17-2.

17 BY MR. NICHOLSON:

18 Q. Dr. McCrary, are you able to see that slide?

19 A. I am kind of. Actually, it's hazy and actually the
20 image of me blocks the lower right-hand portion of it. Do
21 you mind handing me a copy of the slide show?

22 THE COURT: I think it would make sense if
23 Dr. McCrary used the paper copies of the slides. I have
24 paper copies. Everyone here has paper copies.

25 MR. NICHOLSON: And I'm happy to proceed that way.

1 I'll ask Geoff to pull up slides for the corner. Sometimes
2 I'll ask him to enlarge them. It's my understanding the
3 Court has the ability just for a minute or a couple seconds
4 to enlarge them onto the video screen.

5 THE COURT: If you need to. I mean, I have it
6 right in front of me, so I'm not sure that we need to do
7 that.

8 MR. NICHOLSON: I'm happy to proceed however the
9 Court prefers.

10 BY MR. NICHOLSON:

11 Q. Dr. McCrary, from now on I'll just direct you to the
12 paper slides --

13 A. Okay.

14 Q. -- and we'll work from paper if that's okay with you.

15 A. That's fine with me.

16 Q. So, Dr. McCrary, looking at 17.2, is this the slide that
17 you were referring to about your professional experience?

18 A. Yes.

19 Q. Great. And before we dive into the slide here, could
20 you describe for the Court your educational background.

21 A. Sure. So I obtained a Ph.D. in economics at the
22 University of California-Berkeley. I obtained that degree
23 in 2003 and have been teaching since. Prior to that I
24 obtained an undergraduate degree in public policy from
25 Princeton University and obtained that degree in 1996.

1 Q. Now, after you obtained your undergraduate degree, did
2 you go straight into your Ph.D. program?

3 A. No, I did not. I decided to work for a couple of years.
4 I wanted to see what it was that an economist actually did
5 before I embarked on a Ph.D. program, so I went to work at
6 National Economic Research Associates for a short stint and
7 then for a longer stint worked at the Federal Reserve Bank
8 of New York.

9 Q. And what type of work did you do at those two places?

10 A. I don't remember the exact title that they gave me. I
11 believe at the New York Fed I was referred to as an
12 assistant economist. The job description would have been
13 similar across the two, which is I assisted Ph.D.
14 economists, got a sense of how they were approaching the
15 problems that they were trying to approach, and helped them
16 with respect to the details of their investigations.

17 Q. And, Dr. McCrary, for purposes of the court reporter, if
18 I could just ask you to slow down a little bit in your
19 answers. I think it would be helpful and appreciated.

20 A. Understood, and apologies to the court reporter.

21 Q. No problem.

22 Now, turning to your Ph.D. in economics, did the
23 coursework in connection with your Ph.D. involve training in
24 statistical methods?

25 A. Yes. I would describe that as extensive training.

1 Q. And are you familiar with the field known as
2 econometrics?

3 A. Yes, econometrics is sometimes referred to as the
4 application of statistical principles to economic data, but
5 in many ways statistics and econometrics are two parallel
6 fields.

7 Q. And was econometrics part of your study in your Ph.D.
8 program?

9 A. It was. It was one of the two field examinations which
10 I undertook while I was obtaining my Ph.D.

11 Q. And does econometrics play a part in your research today
12 as a professor?

13 A. Yes. I don't necessarily describe myself this way, but
14 many of my peers would describe me as an econometrician, in
15 particular an applied econometrician, focused on applying
16 econometrics to real-world data.

17 Q. Now, after you received your Ph.D., what did you do
18 next?

19 A. I took a position at the University of Michigan in the
20 Economics Department and School of Public Policy.

21 Q. And did you teach classes as part of that job?

22 A. I did. The first course that I taught at the University
23 of Michigan I believe was called something like introductory
24 statistics. I taught that course for a number of years
25 while I was there. I also taught courses on advanced

1 economic theory and also the advanced econometrics course in
2 the Economics Department.

3 Q. And where was it that you worked next?

4 A. After Michigan I proceeded to the University of
5 California, where I took up a position in the law school.
6 And then after that I switched to Columbia University, where
7 I currently teach.

8 Q. Okay. Focusing on the University of California, is it
9 University of California at Berkeley?

10 A. Yes, that's correct. You could just call it Berkeley if
11 you prefer.

12 Q. Sure. And what positions did you hold there at
13 Berkeley?

14 A. Well, I was initially an untenured professor of law. I
15 believe the official title for that is actually acting
16 professor of law at Berkeley. Then I was promoted to tenure
17 in 2010, at which point I was professor of law.

18 Q. Now, as a Ph.D. economist, how was it that you ended up
19 teaching at a law school?

20 A. Well, around 2007 or so I had an offer from the
21 Wisconsin Econ Department and I had an offer from the law
22 school at Berkeley. The -- probably the easiest way to
23 characterize many of my early papers especially is that they
24 had one foot in economics and one foot in law. For example,
25 my dissertation, which was published in *The American*

1 *Economic Review*, was a study of the impact of pattern or
2 practice litigation brought against municipal police
3 departments and in particular trying to understand the
4 effects that that litigation had on work force composition,
5 in particular whether it increased diversity on the police
6 department. And within economics, people thought of that as
7 a study of affirmative action; and within law, people
8 thought of that as a study of the social impact of law. I
9 don't really care which way you characterize it, but that
10 was behind Berkeley's interest in me as a candidate.

11 Q. Now, at Berkeley did you teach any courses concerning
12 statistical sampling?

13 A. I did. I taught a course for a number of years in the
14 Ph.D. program that the law school runs that was parallel to
15 the course on statistics that I used to teach at the
16 University of Michigan, and I also continued to teach an
17 advanced econometrics course in the Economics Department.

18 Q. At Berkeley did any of your teaching involve the issue
19 of estimating damages?

20 A. Well, I had written an article on damages estimation
21 while I was at Berkeley and I drew upon that in my teaching.
22 In particular I ended up developing a course in the law
23 school that at the time was called litigation and
24 statistics. I teach that now at Columbia where it's called
25 litigation economics and statistics. But I would describe

1 damages estimation in that class as part of the curriculum.

2 Q. Okay. And at Berkeley, were you involved in something
3 called the D lab?

4 A. Yes. D lab was not the official name of the
5 organization. It was instead called the Social Sciences
6 Data Laboratory. But that was an attempt by the campus to
7 focus graduate training on big data problems, and I was the
8 first director of the D lab.

9 Q. Okay. And how long were you a professor at Berkeley?

10 A. I think I was a professor there for ten and a half
11 years, but around ten years.

12 Q. Okay. Now let's talk about your current job at
13 Columbia. At Columbia do you teach any classes related to
14 statistical sampling?

15 A. Yes, I do. I alluded a moment ago to that class that I
16 taught at Berkeley called litigation and statistics, and I
17 have taught that at Columbia now I believe twice and am
18 preparing to do so a third time.

19 Q. Would you describe that class in a little bit more
20 detail.

21 A. Sure. So that's a class where I teach students about
22 the techniques of economics and statistics and describe to
23 them the content of those ideas and how they might arise in
24 litigation context, including damages estimation.

25 Q. And, Dr. McCrary, on your slide you list your work at

1 the National Bureau of Economic Research. Would you tell us
2 what that is.

3 A. Yes. The National Bureau of Economic Research is the
4 preeminent association of economists in the world. It's an
5 organization where you become a member by being invited to
6 become one.

7 And I was initially asked to join the National
8 Bureau in I believe 2006, where at that time I was a faculty
9 research fellow. And then later, when I was promoted to
10 tenure, they promoted me as well to a faculty research
11 associate. As well, as part of that charge, for 11 years I
12 co-directed the crime working group of the National Bureau
13 of Economic Research.

14 Q. On your slide you also list expert and advisory work.
15 Do you see that?

16 A. I do, yes.

17 Q. Have you ever done advisory work for governmental
18 agencies?

19 A. I have. So, for example, I'm sitting here in the
20 Southern District of New York. One of those engagements was
21 to help the Southern District to gauge the efficacy of a
22 re-entry program for probationers that are under the
23 supervision of the Southern District. That's an example.

24 Q. And did that assignment involve designing a sampling
25 protocol?

1 A. That did.

2 Q. Okay. Could you describe that in a little bit of
3 detail.

4 A. Sure. So the board of judges was interested in
5 understanding what would be the best way to introduce a
6 re-entry court. They wanted to do so in a way that was fair
7 and equal, but they also didn't have the resources to have
8 everybody participate and so they asked for me to devise a
9 sampling scheme that would select probationers at random
10 from entering cohorts.

11 Q. Okay. I would like to ask you about your expert work.
12 Have you previously offered expert opinions concerning
13 statistical sampling?

14 A. Yes, I have.

15 Q. And at a high level, can you describe the types of cases
16 in which you've offered expert opinions on sampling.

17 A. A wide variety. Some of them have been anti-trust
18 matters. Some have been securities regulation matters.
19 Some have been employment. Others have been contractual.
20 And others have been RMBS matters.

21 Q. Now, with respect to RMBS matters, about how many cases
22 have you offered opinions in regarding statistical sampling?

23 A. I'm not sure of the exact number, but I think it's
24 around a dozen or maybe a little bit above that.

25 Q. Great. And regarding your expert work more generally,

1 have you previously offered opinions relating to the
2 estimation of damages?

3 A. Yes, I have.

4 Q. At a high level, can you describe the types of cases in
5 which you've offered expert opinions on damages.

6 A. That's parallel with what I described a moment ago. I
7 believe it's right that that's typically anti-trust,
8 contracts, RMBS matters, and also employment.

9 Q. And in your expert work, how often is it that you would
10 say you address issues relating to damages?

11 A. I'm not sure of the exact number, but something like
12 probably one out of three cases or one out of four,
13 something like that.

14 Q. Okay. And in the specific context of RMBS litigation,
15 have you offered opinions relating to damages?

16 A. Yes.

17 Q. Okay. And in RMBS litigation, have you been engaged as
18 an expert by plaintiffs or by defendants?

19 A. In RMBS cases, by defendants only.

20 Q. Okay. And outside the RMBS context, have you been
21 engaged by plaintiffs as an expert?

22 A. I have. Usually it's defendants, but I have been
23 retained by plaintiffs.

24 Q. Okay. Turning back to your slide, you mention
25 peer-reviewed publications and research. Have you published

1 research relating to statistical sampling?

2 A. Yes. I think it's right that all of my papers save one
3 have pertained to concepts of statistics.

4 Q. And are those papers, do they concern the application of
5 statistics to problems or are they theoretical in nature
6 only?

7 A. I think I only have one theoretical statistical paper.
8 All of my other papers are applications, that is to say,
9 taking statistics and applying them to real-world data
10 problems, kind of like the dissertation article that I
11 described to you moments ago regarding pattern or practice
12 litigation.

13 Q. Earlier I believe you mentioned an article relating to
14 the estimation of damages. At a high level, can you
15 describe that article relating to damages.

16 A. Yes. So I had been engaged as a consulting expert for a
17 number of years where I had observed testifying experts
18 disagreeing vehemently about two different approaches to
19 damages estimation and I thought that that was striking
20 because there were a set of conditions under which those two
21 approaches were exactly the same and I thought resolving
22 that and clarifying that would be helpful. That's a paper
23 that I wrote together with Dan Rubinfeld.

24 Q. Okay. Thank you.

25 Now, on your slide it says that your publications

1 have been cited over 4,000 times. Can you explain to the
2 Court what that means.

3 A. Yes. In publications, in particular peer review, but
4 also more broadly, what scholars would do is on a particular
5 point where they were trying to cite to authority, they
6 would cite to another authoritative source and so one way
7 that scholars try to determine whether or not their work is
8 having impact is they look at the extent to which they are
9 cited by others in the field.

10 And what that bullet says is simply that across
11 all of the papers that I've written, they have been cited
12 some 4,000 times. And I pulled the estimate from Google
13 Scholar, so it's as accurate as Google Scholar is.

14 Q. Thank you. Now, Dr. McCrary, have you been involved in
15 reviewing research done by others, other scholars?

16 A. Yes, that's a common aspect of being a professor.

17 Q. And you refer on your slide to refereeing manuscripts
18 for academic journals. Would you describe what that means.

19 A. Yes. So my articles are overwhelmingly in what would be
20 described as peer-reviewed journals. Peer-reviewed journals
21 are journals where for the article to be published by the
22 editor, the editor would draw upon the views of experts in
23 the field.

24 So if a manuscript is submitted to a journal, the
25 editor would select five or six different referees, send the

1 manuscript to them and ask for their comments and take that
2 into consideration when deciding what to do with the paper.

3 So referees are instructed to make recommendations
4 as to whether the paper ought to be rejected due to not
5 applying professional standards, whether the paper might be
6 considered for publication after revisions and then as a
7 referee you're supposed to spell out what those revisions
8 would be, and then sometimes you make the recommendation to
9 publish as is. So it's a low, medium, high, so to speak,
10 categorization of the caliber of the work.

11 Q. And on your slide you also refer to serving on Ph.D.
12 committees and evaluating individuals for tenure and
13 promotion. Would you describe that work for the Court,
14 please.

15 A. Yes. So each of those is done in concert with other
16 professors, but it happens at a different scale.

17 So, for example, Ph.D. committee work is typically
18 done with two or possibly three other professors, and the
19 group of professors is to determine whether or not the Ph.D.
20 candidate has done work that is of quality sufficient to
21 warrant a Ph.D. Sometimes that results in counseling the
22 student out of the program. More often than not, it results
23 in describing to the student things that they need to
24 consider, critiques that they need to address, things of
25 that nature. And then ultimately making a recommendation as

1 to the university regarding whether the individual ought to
2 obtain their Ph.D.

3 The work regarding assessing individuals for
4 tenure or promotion more broadly is parallel to that, but it
5 happens at a larger scale. So while work for Ph.D.
6 committees occurs on a scale of three to four professors,
7 work assessing whether or not a professor deserves a
8 promotion occurs at a scale of usually 35 to 50, maybe even
9 70, and that's an extensive discussion that the faculty as a
10 whole has where, again, there's a judgment that is discussed
11 regarding the quality of the work that the candidate has put
12 forward.

13 Q. And when evaluating individuals for tenure and
14 promotion, what types of factors do you consider?

15 A. Usually there are three big categories that people
16 describe for promotion and that would be scholarship,
17 teaching, and service. Teaching is fairly clear. Service
18 is things like that Ph.D. committee assignment that I
19 described. But probably the most important one is the
20 quality of the research. That's the thing that's actually
21 hardest to do well, so it's more often than not the case
22 that people do a good job teaching and they show up to their
23 committee assignments when they are supposed to and perform
24 those tasks well, but scholarship is quite a bit harder to
25 execute on correctly, requires a lot of diligence and so

1 that's usually where you would focus your attention.

2 Q. Now, on your slide you refer to appearing as a
3 discussant at conferences. Would you describe that for us,
4 please.

5 A. Yes. Sometimes at a conference you present your own
6 work. Sometimes you also would present the -- your own view
7 regarding the work of others. So as a discussant, you would
8 discuss a paper.

9 That would depend a little bit on whether I was at
10 a conference which involved only academics or if I was at a
11 conference that involved, as many do these days, a mixture
12 of academics and policymakers.

13 The focus of the comments that you would give as a
14 discussant if it's just an academic conference would usually
15 be about relatively more specific questions. And if you
16 think of the context where policymakers are present, you're
17 often trying to describe what's the bottom line to the
18 research, what are its implications for policy-making,
19 things of that nature.

20 Q. Okay. And are there any other contexts in which you
21 make presentations regarding policy issues?

22 A. Well, I suppose one was last fall when I made a
23 presentation to the board of judges here at the Southern
24 District. I alluded earlier to my work on their re-entry
25 court. And at that time I made a presentation to the board

1 of judges about how feasible sampling would be. And so that
2 was similarly a presentation, something akin to a
3 conference. I forget how many people were in that room, but
4 I want to say 30 or so. That felt pretty similar.

5 MR. NICHOLSON: Your Honor, PRMI tenders
6 Dr. McCrary as an expert in the fields of statistics,
7 economics, and damages.

8 THE COURT: Any objection?

9 MR. NESSER: Yes, Your Honor. Dr. McCrary has not
10 proffered a damages model --

11 COURT REPORTER: I'm sorry. I can't --

12 THE COURT: Is your microphone on, Mr. Nesser?
13 There we go.

14 MR. NESSER: Dr. McCrary has not proffered a
15 damages model in the case. Dr. McCrary was not qualified as
16 a damages expert in the *HLC* trial. Dr. McCrary has
17 testified in no respect to any damages work, I believe, that
18 he has done since the *HLC* trial that ought to change the
19 analysis in any respect. And there's been no evidence that
20 Dr. McCrary has ever proffered a damages model in the
21 context of an RMBS litigation.

22 THE COURT: Do you wish to respond, Mr. Nicholson?

23 MR. NICHOLSON: Yes, Your Honor. I mean, first of
24 all, it's correct that Dr. McCrary isn't affirmatively
25 offering a damages model, but what he's doing is evaluating

1 the damages model that has been put forward by Dr. Snow,
2 which involves both damages and statistics.

3 Dr. McCrary is clearly qualified to assess the
4 damages components of that model. He has published research
5 on damages. He teaches on damages. He has served as a
6 damages expert in other cases.

7 The opinions that he is offering in this case are
8 not quite the same as the ones in the *HLC* case because his
9 assignment was broader and concerns some additional issues.
10 So the *HLC* case I don't think is the relevant issue here.

11 He clearly has the qualifications in order to
12 assess the damages components of Dr. Snow's work. He, like
13 Dr. Snow, is an economist with experience in econometrics,
14 experience in statistics. He's clearly qualified to comment
15 on the damages components of Dr. Snow's methodology.

16 THE COURT: Mr. Nesser, anything further before I
17 rule?

18 MR. NESSER: Your Honor, I would only point out
19 that to say that somebody is an expert in damages generally
20 is one thing, but the purported opinions that -- to the
21 extent that there are going to be any opinions offered today
22 that go beyond statistics, there's going to be opinions
23 about how to measure damages or what's an appropriate
24 measure of damages in the context of an RMBS litigation and
25 he has no experience at all with respect to measuring

1 damages in an RMBS litigation.

2 MR. NICHOLSON: Your Honor, may I just respond
3 briefly? I believe that's incorrect. Dr. McCrary testified
4 that he has been involved as an expert in RMBS litigation.
5 He has also in his deposition explained, and I'm happy to
6 elicit it from him here, that as part of his work in RMBS
7 cases he has been involved in estimating damages as well.

8 So I don't think there's any basis to say that he
9 has no expertise in this. He has similar expertise to
10 Dr. Snow. He's perfectly qualified to comment on Dr. Snow's
11 methodology.

12 MR. NESSER: Your Honor, to begin with, Dr. Snow
13 has worked on -- I believe he testified he's worked on 75
14 RMBS matters over the last 15 years.

15 But putting that aside, again, the expertise and
16 experience that Dr. McCrary has in the field of damages with
17 respect to RMBS is in the context of offering statistical
18 opinions that happen to bear on a damages analysis and he's
19 done that, of course, in multiple RMBS cases. That's
20 different than saying that Dr. McCrary is qualified to opine
21 on what an appropriate measure of damage is or what an
22 appropriate damage allocation might be on the facts of this
23 case.

24 THE COURT: All right. To the extent that there
25 are concerns about Dr. McCrary's qualifications, I believe

1 they go to the weight of the evidence, not whether he can be
2 qualified as an expert here today and I think they can be
3 fully addressed in cross-examination. So the objection is
4 overruled and Dr. McCrary is so received.

5 MR. NICHOLSON: Thank you, Your Honor.

6 And just to seek the Court's guidance, I'm about
7 to enter a new phase. Would you like to take a break at
8 this stage or keep going for some time?

9 THE COURT: Well, we could take our lunch break
10 now. I know that we are in discussions with the Southern
11 District of New York about how long we can go today in light
12 of the difference in time.

13 MR. NICHOLSON: Yes, Your Honor.

14 THE COURT: I don't know the answer to that yet.
15 I suspect it will be 4:00 or 4:30, which would be 5:00 or
16 5:30 their time. But I should have an answer during the
17 lunch hour.

18 I've also asked them whether -- we had not
19 previously raised tomorrow with them. Now that's being
20 raised with them. I should get an update then later,
21 perhaps during the lunch hour, on whether there's any
22 concern about whether the courthouse will be closed to folks
23 tomorrow in New York.

24 The other question I've asked of the Southern
25 District is whether we could begin at 8:00 a.m. Minneapolis

1 time, which would be 9:00 a.m. New York time, which would
2 hopefully give us enough time to get through Dr. McCrary
3 tomorrow.

4 So there's a lot up in the air here. With that
5 said, however, we will take a lunch hour and come back at
6 1:30 Central Time. So, Dr. McCrary, I understand that will
7 be 2:30 your time.

8 Anything further we should discuss today right now
9 before the lunch break?

10 MR. NICHOLSON: Your Honor, on a completely
11 unrelated note --

12 THE COURT: Yes.

13 MR. NICHOLSON: -- the parties have been meeting
14 and conferring about the bankruptcy-related exhibits in
15 connection with the Lipps stipulation. I'm happy to report,
16 and I think Mr. Scheck will say the same, that we have
17 narrowed those disputes and I think there's a set that the
18 parties agree can come into evidence for non-hearsay
19 purposes.

20 I think there are disputes on a small number,
21 discrete disputes on a small number of exhibits, and
22 Mr. Scheck and I will be happy to address those today,
23 perhaps right before we get into Dr. McCrary.

24 THE COURT: Do we need to address that before we
25 continue with Dr. McCrary?

1 MR. NICHOLSON: Well, in light of the timing
2 concerns, I think we can postpone that. But I just wanted
3 to advise the Court.

4 THE COURT: It might make sense to do it at the
5 end of the day --

6 MR. NICHOLSON: You're right.

7 THE COURT: -- when Dr. McCrary is forced to
8 leave.

9 MR. NICHOLSON: I'm happy to do that. I just
10 wanted to advise the Court that we had that issue.

11 THE COURT: Anything further?

12 Okay. Court is adjourned until 1:30.

13 (Lunch recess taken at 12:14 p.m.)

14 * * * * *

15 (1:37 p.m.)

16 **IN OPEN COURT**

17
18 THE COURT: Good afternoon.

19 Good afternoon, Dr. McCrary. This is Judge Nelson
20 and we're going to proceed if you're all ready to go.

21 THE WITNESS: I am ready, Your Honor. Thank you.

22 THE COURT: All right. Mr. Nicholson.

23 MR. NICHOLSON: Thank you, Your Honor.

24 BY MR. NICHOLSON:

25 Q. Good afternoon, Dr. McCrary. Excuse me. Feedback.

1 Dr. McCrary, just to confirm, are you able to see
2 and hear me okay?

3 A. I am, yes.

4 Q. Terrific. Dr. McCrary, I'd like to turn to your
5 assignment in this matter. At a very high level, will you
6 describe the nature of your assignment for the Court?

7 A. Yes. I touched upon that earlier in my testimony. My
8 assignment was to review the expert reports submitted by
9 Dr. Snow and to gauge the quality of the sampling and
10 damages methodology that he put forward.

11 Q. So as part of your assignment, did you review Dr. Snow's
12 written reports?

13 A. Yes, I did.

14 Q. Okay. And did you also review Dr. Snow's testimony from
15 this trial?

16 A. Yes, I did.

17 Q. And have you prepared a slide that summarizes your main
18 opinions in this matter?

19 A. I have.

20 Q. Dr. McCrary, would you look at slide DDX-17.3, please?

21 A. Yes.

22 Q. Is this the side you are referring to?

23 A. This is, yes.

24 Q. Okay. At a high level, would you please summarize your
25 first main opinion?

1 A. Yes. The first main opinion pertains to the relative
2 strength of claims and defenses; and at a high level the
3 idea is that if there is a defendant who has relatively more
4 loans and trusts that are subject to weaker claims or
5 stronger defenses, then that might be a defendant where you
6 might argue that there should be a discount applied, and
7 that's the basic idea associated with the first idea on the
8 slide.

9 Q. And in relation to this first opinion, does Dr. Snow
10 make any assumption as part of his analysis regarding the
11 strength of claims and defenses?

12 A. He does. There's an implicit assumption in his
13 approach, which is that every loan has the same quality in
14 terms of strength of claims and defenses. So they're all
15 treated on an equal basis, even though it may be right that
16 some trusts may be quite different than others.

17 Q. At a high level, what's the significance of this first
18 opinion?

19 A. I think that the significance of this first opinion is
20 pretty decisive, actually, which is the primary
21 justification for a sampling and extrapolation exercise is
22 that it would lead to an unbiased estimate; and in this
23 context I believe that the failure to attend to these
24 concerns leads the estimates, in fact, to be biased and in
25 particular for PRMI, for the damages amount that is put

forward by Dr. Snow to be overstated.

Q. Okay. Let's turn to your second main opinion here.

Would you please give the Court a summary of that opinion.

A. Yes. So Dr. Snow applies his damages methodology to the trust settlement and also to the four monoline settlements.

This second opinion pertains to the trust settlements, and it's my view that that approach violates three of the pillars of statistics as I'll outline in my testimony today.

Q. And setting aside your opinions on the strength of claims and defenses, and if we focus only on this second opinion here, do the violations with respect to the trust settlement render Dr. Snow's trust methodology completely unusable?

A. I think that type of statement is probably overly strong. I think it's right that the trust methodology is one that is not completely unusable and instead would require some adjustments. It's not correct that Dr. Snow's damages numbers that he testified to makes those adjustments, but I believe adjustments could be made and that would allow for recovery from missteps.

Q. Let's turn to your third main opinion here. Would you please give the Court a summary of that opinion.

A. Yes. So with respect to the monoline settlements, it's my view that that approach violates all five of the pillars that I'll testify regarding in a moment, and that is that

1 all five of those pillars are ones that would traditionally
2 support a statistical analysis. In my view, the monoline
3 methodology is entirely unreliable and ought not be used.

4 Q. And Dr. McCrary, are you aware that in response to your
5 report Dr. Snow has now offered what he calls a settlement
6 specific approach in a non-extrapolated calculation for the
7 monolines?

8 A. Yes.

9 Q. Do those new approaches change your view that his
10 original monoline methodology is unreliable?

11 A. They don't. My critiques of his monoline methodology
12 pertain to sampling and to extrapolation specifically. The
13 non-extrapolated approach to the monoline settlements
14 actually is an approach that I would have said might be
15 workable, unlike those that involve extrapolation.

16 Q. So is it your view here that Dr. Snow hasn't offered any
17 potentially reliable way to estimate monoline damages?

18 A. I'm not sure that I would necessarily say that the
19 non-extrapolated approach was reliable, but it might be;
20 whereas, the approaches to monoline damages estimation
21 engaged in by Dr. Snow that do rely upon sampling, I think
22 that those are fundamentally unreliable.

23 Q. Thank you. Dr. McCrary, let's turn to your first
24 opinion and discuss that in an a little bit more detail.

25 Now, in connection with your opinion regarding the

1 strengths of claims and defenses, did you review the
2 opinions of any other experts?

3 A. I did.

4 Q. And whose opinions did you review?

5 A. David Woll's.

6 Q. And at a high level, what's your understanding of
7 Mr. Woll's opinions?

8 A. At a high level, my understanding of Mr. Woll's opinion
9 is that for PRMI -- well, better said, that a reasonable
10 defendant in RFC's position would have taken into account
11 the relative strength of claims; and in particular, that if
12 there are claims that have -- that are weaker or that have
13 stronger defenses, that that's something that ought to be
14 true on a trust-by-trust basis, and he reaches opinions
15 specifically regarding specific trusts with respect to
16 strength of claims.

17 Q. And did Dr. Snow account for any variations in the
18 strength of claims and defenses as part of his damages
19 methodology?

20 A. No.

21 Q. And earlier I think you referred to an assumption that
22 he made. Would you explain that in a little bit more
23 detail?

24 A. Yes. The implicit assumption is that all loans have the
25 same strength of claim and same defenses; whereas, if you

1 look on, for example, trust-by-trust basis, some trusts
2 might have a statute of limitations defense, but there's not
3 an effort made by Dr. Snow to take that into account. So
4 implicitly what's assumed is that each trust has equal
5 strength of claims and defenses.

6 Q. And I think earlier you referred to the concept of bias.
7 Can you explain how that concept relates to your opinion
8 here?

9 A. Yes. Well, it's a fairly straightforward point. Let me
10 try to make it as simple as I can. The basic idea is that
11 if a particular defendant, such as PRMI, have their loans in
12 trusts where those trusts were subject to weaker claims or
13 to stronger defenses, then it would be appropriate for there
14 to be a discount applied to those trusts, and in particular
15 to the loans that are in that trust. When that's not done,
16 the defendant in question, in this case PRMI, has an
17 overstated damages number associated with Dr. Snow's
18 methodology.

19 Q. Now, in general, would it have been possible for
20 Dr. Snow to design a methodology to account for the strength
21 of claims and defenses?

22 A. Yes, I believe it would have been.

23 Q. And based on your review of his reports, did you see any
24 indication that he explored ways to account for the strength
25 of claims and defenses?

1 A. No, I don't believe that he explored that. He had some
2 testimony regarding that, but that was not in his reports.

3 Q. Okay. Let's talk about some of Mr. Woll's specific
4 opinions. Did you review his opinions concerning the
5 no-fraud representations and the fraud disclaimers?

6 A. I did.

7 Q. Okay. And at a very high level, can you give or explain
8 your understanding of those opinions.

9 A. I touched upon this earlier. It's my understanding of
10 his opinion that a reasonable defendant would have taken
11 into account in particular a lack of no fraud
12 representations or fraud disclaimers associated with
13 particular trusts.

14 Q. And did you investigate whether PRMI's loans were in
15 trusts that either lacked fraud -- I'm sorry -- that either
16 lacked no-fraud representations or included fraud
17 disclaimers?

18 A. I did, yes.

19 Q. And did you prepare some slides with those findings?

20 A. I did, yes.

21 Q. Dr. McCrary, could you look at DDX-17.4, please?

22 A. Yes.

23 Q. Would you please describe your findings on this slide.

24 A. Yes. This is a chart that has two bars. The left-hand
25 bar corresponds to the set of global loans. The right-hand

1 bar corresponds to the set of PRMI loans. And what the
2 chart shows is that PRMI has relatively more loans in trusts
3 that lack no-fraud representations, and in particular the
4 percent of losses associated with PRMI's loans are to a
5 greater extent in trusts that lack no-fraud representations.
6 Specifically, PRMI has 94 percent of its losses in such
7 trusts and that's a much higher number than the number for
8 the overall global sample, which is instead at 83 percent.

9 Q. And these loss numbers here, where do those come from?

10 A. What I'm doing there is I'm taking Dr. Snow's actual
11 plus expected losses and saying those are the losses
12 associated, according to Dr. Snow, with specific loans. All
13 I'm doing here is I'm determining on the basis of Mr. Woll's
14 opinion what fraction of those losses are in such trusts.

15 Q. Thank you. Let's look at slide DDX-17.5. Do you have
16 that, Dr. McCrary?

17 A. I do.

18 Q. Okay. Would you please describe your findings on this
19 slide.

20 A. This slide is parallel to the prior slide. So, again,
21 if you look on the left you see loans for the global, and if
22 you look on the right you see loans for PRMI. And the chart
23 shows that, overall, the percentage of losses in trusts with
24 fraud disclaimers is much higher for PRMI than it is
25 generally. In particular, for PRMI, 72 percent of its

1 losses are in trusts with fraud disclaimers; and that's a
2 much higher number again than the 48 percent that
3 corresponds to all loans.

4 Q. Okay. How would you say these two percentages compare?

5 A. I would say that for PRMI it's about one and a half
6 times as high as it is for the global sample.

7 Q. And as part of his allocation methodology, did Dr. Snow
8 account for the percentage of losses on PRMI loans that were
9 in trusts that either lacked a no-fraud representation or
10 included fraud disclaimers?

11 A. No. And Dr. Snow's methodology, each trust gets handled
12 on an equal basis.

13 Q. And let's return to Mr. Woll's opinions. Did you review
14 his opinions concerning the statute of limitations defense?

15 A. I did, yes.

16 Q. Okay. At a very high level, what's your understanding
17 of that opinion?

18 A. Again, it's my understanding of Mr. Woll's opinion that
19 a reasonable defendant, a reasonable party such as RFC,
20 would take into account statute of limitations defenses and
21 that that would affect their settlement.

22 Q. And did you investigate whether PRMI's loans were in
23 trusts subject to statute of limitations defenses?

24 A. I did.

25 Q. And did you prepare a slide on your findings on that

1 issue?

2 A. I did.

3 Q. Okay. Let's look at DDX-17.6, please. Let me know when
4 you're there.

5 A. I am.

6 Q. Okay. Dr. McCrary, would you please describe your
7 findings on this slide.

8 A. Again, this chart parallels the prior two. What you see
9 on the left is the number of corresponding to global, and
10 the number on the right is for PRMI. And what you see is
11 that PRMI has relatively greater share of losses in trusts
12 that are subject to statute of limitations defenses. In
13 particular for PRMI, the estimate is 69 percent; whereas,
14 for the global, the estimate is 35 percent. So about a
15 factor of two difference.

16 Q. Okay. And as part of his allocation methodology, does
17 Dr. Snow account for the percentage of losses on PRMI loans
18 in trusts subject to statute of limitations defenses?

19 A. No. Again, there's no attempt made to adjust for
20 statute of limitations defenses and how that might apply
21 differently to some trusts than for others.

22 Q. And did Dr. Snow use as part of his trust damages
23 methodology what's called a settlement factor?

24 A. He did. He uses 28 percent across the board.

25 Q. And is that settlement factor affected in any way by

1 statute of limitations defenses?

2 A. No. It's the same number regardless.

3 Q. And earlier you said you reviewed Dr. Snow's trial
4 testimony. Is that right?

5 A. Yes, that's correct.

6 Q. In general, do you recall Dr. Snow testifying about
7 whether accounting for the strength of claims and defenses
8 would affect the margin of error on his damages estimates?

9 A. That is consistent with what Dr. Snow testified to, yes,
10 that's what I took him to be saying.

11 Q. Okay. What's your reaction to that testimony?

12 A. I thought that that really misses the point. I think
13 it's possibly true that there may be some effect of a
14 methodology that tried to take account of relative strength
15 of claims and defenses on a margin of error. I haven't seen
16 him quantify that, but that might be right.

17 But the central point is not related to margin of
18 error and the need to take account of that for that type of
19 an approach. The central issue instead is that failing to
20 take account of that leads to bias for particular
21 defendants; and for a defendant such as PRMI, where there
22 are relatively weaker claims associated with loans that they
23 have in particular trusts or relatively stronger defenses,
24 that means that for them the damages number that Dr. Snow
25 puts forward is overstated.

1 Q. Okay. Dr. McCrary, I would like to turn to your
2 opinions regarding whether Dr. Snow's methodology violates
3 the pillars of statistical sampling. At a high level, can
4 you describe what your opinions are on that issue?

5 A. Are you asking now about the trust or about the monoline
6 settlements?

7 Q. You can just discuss both at a high level.

8 A. Well, at a high level, statistics relies upon many
9 different types of approaches and knowledge, but when I
10 teach the subject, I describe statistics as leaning on five
11 pillars, and I've outlined those here in a demonstrative for
12 the Court. But it's my view that the trust methodology in
13 particular violates three of those, and that the monoline
14 methodology violates all five.

15 Q. And would you look at slide DDX-17.7, please.

16 A. Yes.

17 Q. Is this the slide you were referring to?

18 A. It is.

19 Q. Okay. Would you please describe the first pillar of
20 statistics here.

21 A. The first pillar is probably the simplest one to
22 understand, which is that a statistical analysis has to
23 start by asking the right question. In a way there's
24 nothing technical about that, yet it's so important that
25 even people who are truly advanced statistically need to be

reminded of that question again and again.

Q. And can you explain -- what's the content of this first pillar?

A. Well, the content of the first pillar is that it's very easy to think of a question that you have an easy time answering without thinking carefully about, well, what is it that ultimately needs to be decided, what is the statistical information supposed to be for. So whenever I teach students about designing samples, I always ask them, What are you going to use the data for? In particular, what are you trying to answer? What are you trying to address? And it may be right that if you don't think carefully about that, you could find yourself in a situation not dissimilar from the one here, whereby there's a sample drawn that's intended for one purpose that may not be appropriate for another purpose.

Q. Now, does this mean that a sample designed to answer one question can never be used to answer a different question?

A. No, I think that's overly strong, but I would say it's case by case. There are contexts where you would say the sample drawn from this particular purpose really ought not to be used for some other purpose; and you'll see descriptions of that, for example, in government statistics and other kinds of information. Authors, for example, will caution an interpretation of their figures. But in other

1 contexts, it may be possible, for example, to engage in
2 bounding exercises that may say the maximal impact of having
3 drawn the sample for this other purpose on the current
4 analysis is X, and you may be able to actually quantify what
5 that is.

6 Q. Okay. Let's turn to your second pillar. Would you
7 describe that pillar for the Court, please.

8 A. This one is one that most people are familiar with just
9 from a very basic understanding of statistics, which is that
10 if you are going to use a sample for a particular purpose,
11 it has to be representative of and drawn from the correct
12 population. You would not try to defend a statistical
13 exercise when it was actually drawn from an incorrect
14 population. You would usually go back and draw from the
15 correct population.

16 Q. And suppose that you drew your sample from a subset of
17 the correct population. Does that mean the sample is
18 completely unusable?

19 A. No. My answer here parallels actually the answer to
20 your prior question, in part because the first and second
21 pillar have some overlap. That is to say, if you draw a
22 sample for one purpose and you want to use it for another
23 purpose, it may be right that you can engage in a bounding
24 analysis like the circumstance that I described before where
25 it might be right that if you started trying to answer one

1 question and pivoted, you might be able to engage in an
2 adjustment that would allow you to recover from that.

3 Q. So can you give us an example of how that type of
4 bounding analysis would work?

5 A. Sure. So, for example, if you were trying to estimate
6 the poverty rate for Minnesota, it might be the case that
7 you had drawn a sample of homeowners and you had estimated
8 the poverty rate based on the set of homeowners that were in
9 your sample. If you have an estimate of the population that
10 were homeowners, you could try to back out what would be the
11 population of people who were not homeowners and say, well,
12 people in that subsample could either be designated poor or
13 not on the basis of whether their income was below or above
14 the poverty line respectively; and then you might say there
15 are two scenarios where I could make up the data, which is
16 to say bracket what could be the maximal effect on my actual
17 bottom line number of the fact that I actually didn't sample
18 from the entire population of Minnesota. I only sampled
19 homeowners.

20 So that's a simple example in which you would take
21 an estimate that corresponded to a subgroup and you would
22 then give two numbers, below and above that, corresponding
23 to what's called a bounding analysis.

24 Q. So if I'm understanding you correctly, you would assume
25 that either all renters either were above the poverty rate

1 or all were below; is that what you are saying?

2 A. That's correct.

3 Q. Okay. And are those realistic assumptions to make?

4 A. No, of course not. So they're not intended to be
5 realistic. They're intended instead to stick to the science
6 of sampling and statistics. Statistics is a field in which
7 we approach things scientifically and we defend a
8 statistical approach not by saying it might be right, but
9 instead articulating here are the conditions under which it
10 would be correct.

11 And when we engage in bounding analyses, we're
12 following in that same tradition of being precise and
13 scientific in our calculations. What we're doing is saying
14 here is the information that the sample conveys. One of the
15 primary proponents of bounding in the modern era is Charles
16 Manski. Charles Manski has often been described as on the
17 short list for the Nobel Prize specifically for this idea;
18 and I probably won't quote him exactly right, but the
19 essence of his writing in this area is the sample really
20 doesn't generate any more information than the bound. If
21 you've drawn from the wrong population, you have drawn from
22 the wrong population and that limits the amount of
23 information that the sample can confer.

24 Q. Let's turn to the third pillar now. Would you briefly
25 describe that pillar, please.

1 A. Yes. And actually it might be helpful, since Your Honor
2 is looking at the same slide, I'll just read it and in part
3 that's because there is language there that's technical
4 unlike the first two pillars.

5 So the third pillar as I have articulated it here
6 is "Ensure that the methodology produces an accurate margin
7 of error that is sufficiently precise." And there's
8 actually three different technical ideas running around
9 inside of there and so let me pause to elaborate on each of
10 those.

11 The first is margin of error. That's a familiar
12 concept to many of us. We read in the newspaper that
13 there's a statistician who has put forward an estimate and
14 then they say plus/minus, and then there's a number that
15 follows after the plus/minus. The number that follows after
16 is a margin of error, and it says how much uncertainty is
17 there attached to my sample estimate by virtue of the fact
18 that I sampled.

19 And that is to say when you draw a sample, you
20 might have gotten some specific configuration of data. If
21 you had drawn a different sample, you might have gotten a
22 different estimate. And the margin of error quantifies how
23 big of a swing that is. So that's the first technical idea.

24 The second technical idea is accuracy. So a mild
25 embarrassment to the field of statistics is not only do we

1 have estimates, but it turns out our margins of error are
2 themselves estimates, which is to say we don't always know
3 for sure what the margin of error actually is. We instead
4 have a methodology for estimating it also.

5 And what that means is that just because somebody
6 has put forward a margin of error doesn't necessarily mean
7 that it's actually the correct margin of error. It's quite
8 possible for a margin of error itself to be too small, which
9 then understates the amount of uncertainty there is attached
10 to the bottom line estimate.

11 Then finally, the third piece that I wanted to
12 pause on with respect to the third pillar is that that
13 margin of error if it is accurate is hopefully sufficiently
14 precise that it's actually a helpful piece of information.
15 It is possible for there to be estimate that is estimated
16 with such imprecision that it's actually no longer
17 informative regarding the bottom line question, and so to me
18 that's a violation of the third pillar of statistics.

19 Q. I think on that note, I believe Dr. Snow has testified
20 that the margin of error relates only to the precision of
21 your estimate and not to the reliability of the estimate.

22 Do you agree with that statement?

23 A. No, I don't. I think that that is taking the term
24 "reliability" and twisting it, in my mind. If there's an
25 approach that yields margin of error that is so wide that it

1 conveys no additional information above and beyond what you
2 have before you engaged in the sample, I don't understand
3 how that could be reliable for any particular purpose.

4 Q. Let's turn to the fourth pillar. Would you please
5 describe that pillar for the Court.

6 A. Yes. So as it's stated on the page, that fourth pillar
7 is to ensure that the sample estimate is unbiased. And here
8 I don't mean bias in the traditional sense. I mean this in
9 the statistical technical sense, which is to say the
10 unbiasedness of a sample estimate is the claim that before
11 you actually engaged in the number, your best estimate
12 actually for the true value that you're looking for is going
13 to be the estimate that you, in fact, obtain. And in this
14 context that can be justified, that is to say, there are
15 circumstances such as, for example, sampling from the
16 correct population, that might lead to results like that,
17 and those are statistical approaches and methodologies that
18 are esteemed, and those that are deemed to be biased are
19 those that are eschewed.

20 Q. And is it possible to have an estimate that is precise
21 but also biased?

22 A. Yes. The traditional way that I would explain this to
23 students would be through the idea of an archer. You can
24 have an archer who is shooting arrows at a barn, say, and
25 they've got a bull's eye set up towards the left hand of the

1 barn; and it may be right that those arrows are clustered at
2 the one bull's eye, but if the correct target was actually
3 on the right-hand side of the barn, not the left, you would
4 say, Well, those are clustered tightly together, they're
5 precise, but they're actually focused on the wrong thing.
6 And in that context you would say that that would be an
7 archer who had great precision for the wrong thing or a
8 biased archer with precision.

9 Q. Let's turn to the fifth pillar. Would you describe that
10 for us.

11 A. Yes. So that pillar would be to be apparent and to use
12 justified assumptions. What I mean by that is statistical
13 analyses frequently invoke assumptions, and of course for
14 the consumer of that statistical information, they're owed
15 an understanding of what those assumptions are so that they
16 can gauge the value of the statistical information for
17 themselves.

18 So the first part of that is to be transparent
19 about what it is that you are assuming. The second part of
20 that is you can make assumptions, but that doesn't somehow
21 turn them into truth. So the second part of that is to make
22 sure that the assumptions that you're employing are ones
23 that have a reasoned basis for being true, not just that
24 you've assumed it to be so, but rather that you have a good
25 reason for thinking that that is so.

1 Q. Can you give us an example that illustrates this fifth
2 pillar?

3 A. There are many, but one of them would be, for example, a
4 homogeneity assumption. This comes up with respect to my
5 opinion regarding Dr. Snow's methodology later on. But this
6 idea would be that if you've assumed that two things are
7 actually equal and estimated a single number, that doesn't
8 actually make it the case that it's that single number.
9 Instead, those could be two different quantities.

10 So, for example, if you were going back to the
11 Minnesota poverty rate example, if you were trying to use a
12 national sample to estimate things, it might be right that
13 you had a very small sample size in Minnesota. And so if
14 you tried to repurpose that national analysis for a focus on
15 Minnesota, one thing that you could consider, that I would
16 not counsel but one might consider it, is to make an
17 assumption that Minnesota is like the rest of the nation.
18 And to the extent that that assumption is wrong, you're
19 following statistical analysis would of course be incorrect.

20 There could be a statistical analysis that took
21 the national sample and formed an actual estimate, but the
22 assumption that would be employed there would not be one
23 that was justified. It was simply assumed. So in that
24 context I would say that would be an error. A better
25 approach would be to go back and draw a sample that was

1 specific to Minnesota if you were trying to estimate the
2 poverty rate for Minnesota.

3 Q. Okay. We've now gone through your five pillars.

4 Dr. McCrary, are these the only five pillars in the field of
5 statistics?

6 A. No, I don't think anybody would say anything along those
7 lines. I certainly don't want to. Statistics relies on
8 principles. It's a field of mathematics and is a scientific
9 subject. There are many different aspects to statistics.
10 These are simply the five aspects of statistics that are
11 relevant to my concerns regarding Dr. Snow's methodology as
12 applied in this case.

13 In other contexts it might be right that there
14 were other principles of statistics that would be more
15 relevant, and some of these might in such a case still be
16 something that I would be concerned about and would want to
17 emphasize, and maybe others would fall away.

18 Q. So in other cases have you focused on a different number
19 of pillars than five pillars?

20 A. I may have. I don't think it's right that in each case
21 these five pillars would necessarily be what the Court wants
22 to focus on.

23 Q. Now, returning to these five pillars, are these pillars
24 that you teach in your statistics classes?

25 A. They are.

1 Q. And what types of classes have you taught them in?

2 A. All of the classes that I've taught pertaining to
3 statistics ranging from introductory classes on the subject
4 where undergraduates or policy students are absorbing that
5 information for the first time, all the way up to the
6 advanced econometrics classes that I've taught at the
7 University of Michigan and at UC-Berkeley. That is to say
8 classes where students will have studied statistics for
9 several years as an undergraduate and will have had three
10 years of graduate course work under their belt, it would
11 still be true that you would want to start by reminding
12 those students to start by asking the right question.

13 Q. Okay. Do these pillars have any importance in real
14 world applications of sampling?

15 A. Absolutely. I think that if you approach real world
16 problems, you find that it's frequently right that you would
17 want to review each of these for engaging whether or not
18 it's right, that you have been able to produce a statistical
19 quantity that's helpful for a real world context.

20 Q. Okay. And now I would like to shift gears and discuss
21 how these five pillars relate to your opinions on Dr. Snow's
22 methodology. Have you prepared some slides on this?

23 A. I have.

24 Q. Okay. And would you look with me at slide 17.8, please?

25 A. Yes. I'm there.

1 Q. And, Dr. McCrary, would you briefly describe your
2 opinions here regarding the first pillar.

3 A. Yes. It's my view that Dr. Snow began by trying to
4 answer one question and designed a sampling protocol that
5 was consistent with that; and then later his assignment
6 changed and he was asked to answer different questions. And
7 with respect to that, I think that mismatch between his
8 sampling methodology and what ultimately gets put to leads
9 to errors with respect to the bottom line.

10 Q. Okay. And would you now look at slide 17.9, please.

11 A. Yes, I'm there.

12 Q. And would you briefly describe your opinions on this
13 slide regarding the second pillar.

14 A. Yes. So here the opinion that I've described here is
15 one that's quite simple, which is that Dr. Snow drew loans
16 from the sample of what's termed "at-issue" loans, and those
17 aren't actually all of the loans that are covered by the
18 settlements. They are a subset of those.

19 Q. Okay. And let's turn to slide 17.10. Would you briefly
20 describe your opinions regarding the third pillar on this
21 slide.

22 A. Yes. Dr. Snow's margins of error are large. Very
23 large. That's true for both the trust settlement as well as
24 for the monoline settlements, but for the monoline
25 settlements it's accentuated.

1 Q. And are there any issues with respect to the monoline
2 settlements on whether the margin of error itself was
3 accurate?

4 A. There are. So there are assumptions -- and this circles
5 back to the fifth pillar -- there are assumptions invoked
6 with respect to the monolines that are perhaps rather
7 implicit as opposed to explicit, and those actually lead the
8 stated margins of error to likely be inaccurate.

9 Q. And let's look at slide 17.11, please.

10 Dr. McCrary, would you briefly describe your
11 opinions on this slide regarding the fourth pillar.

12 A. Yes. With respect to the fourth pillar, Dr. Snow's
13 estimates of breach rates as well as damages are biased.

14 Q. And how does this relate to the first main opinion you
15 gave regarding the strength of claims and defenses?

16 A. Well, strength of claims and defenses is one aspect of
17 bias, but that's not the only one. So if you look at the
18 details of Dr. Snow's approach, he draws his sample to
19 generate a count-based breach rate estimate, but actually
20 when it goes to damages, he uses loss weighting, and there's
21 some extra slippage that gets introduced in that context.

22 Further, it's also true that ultimately there's a
23 question not of estimating a breach rate, but instead of
24 allocation. And with respect to the allocation, what's
25 needed is not necessarily just an estimate of a breach rate,

1 but actually the breach rate for PRMI in this particular
2 case relative to an estimated breach rate overall for the
3 global sample. And the ratio of two things is actually
4 something that's a little bit tricky to do, but that's part
5 of his allocation methodology.

6 Q. And are there any particular issues of bias that relate
7 to the monoline settlements?

8 A. Yes.

9 Q. At a high level for now.

10 A. Fair. So with respect to the monoline settlements, I
11 have made an allusion a moment ago to the invocation of an
12 assumption, in particular a homogeneity assumption, and
13 that's an assumption which also leads to bias with respect
14 to the monoline settlements particularly.

15 Q. Okay. And let's look at the slide 17.12, please. I
16 think you may have just been discussing this, but can you
17 talk about your opinions as they relate to the fifth pillar,
18 again, at a very high level for now.

19 A. Yes. Apologies. Sometimes I speak with too much
20 detail. But Dr. Snow's analysis does depend on assumptions
21 and it's true that sometimes those assumptions are more
22 implicit than explicit. What I've tried to do in my reports
23 is to flesh this out to make sure that those are understood.

24 Sometimes those assumptions in particular are
25 assumptions that are very hard to justify and, in fact, are

1 very contrary to the available evidence, and I've tried to
2 make sure that that's understood because I think that that's
3 a very important aspect of any statistical analysis.

4 Assumptions that are invoked have to be clear to the
5 consumer of the information and they also have to have a
6 reasoned basis for being true.

7 Q. And in going back to your first opinion regarding
8 strength of claims and strength of defenses, is there any
9 connection between that opinion and this pillar?

10 A. There can be as well. So in particular, the equal
11 treatment, so to speak, of different trusts, even if it's
12 right, that the strength of claims and defenses may differ
13 substantially across them, that's something that's not so
14 clear until you are digging into the analysis. I don't
15 think it's right that that's an assumption that Dr. Snow
16 flags for the trier of fact.

17 Q. And if we take a step back from these five pillars, is
18 it your view as a matter of statistics that sampling is
19 inappropriate in this case?

20 A. No. I am aware that there are some legal contexts where
21 it's determined as a matter of law that sampling is not
22 appropriate, but as a statistical matter, I would say that
23 one can use sampling to estimate damages generally, and it's
24 possible I believe in a context like this to use sampling
25 for such a purpose. I take the issue of whether or not it's

1 correct as a matter of law to be a separate consideration
2 that's not my domain.

3 Q. Okay. Let's turn now to the issue of the way that
4 Dr. Snow designed his sample. In terms of Dr. Snow's
5 assignment, do you have an opinion on what led him to
6 violate the pillars of statistics you've been discussing?

7 A. Well, I believe it's right that Dr. Snow is put in a
8 very difficult position. I've reviewed Dr. Snow's
9 background. I don't have any reason to doubt that he knows
10 what he's doing with respect to statistics, but it's also
11 true that he had constraints that were put upon him by
12 virtue of instructions he was given by counsel. And it's my
13 view that the change with respect to his assignment actually
14 led to most of the errors that we see, and that's
15 particularly pronounced for the monoline settlements.

16 Q. Now, just to be clear, did Dr. Snow design his sampling
17 protocol for the PRMI case in particular?

18 A. No. It's my understanding that at the time that he
19 designed his sample, PRMI was not even a defendant. So he
20 designed his sample for the First Wave cases and PRMI was a
21 defendant later on, is my understanding.

22 Q. Okay. And did you create a slide discussing the design
23 of Dr. Snow's sampling protocol?

24 A. I did.

25 Q. Okay. And could we look at slide 17.13, please?

1 A. Yes. I'm there.

2 Q. Okay. Is this the slide you are referring to?

3 A. It is, yes.

4 Q. And just to orient us, can you describe what the two
5 columns on this slide represent?

6 A. Of course. The left-hand column is an attempt to give a
7 30,000-foot perspective on what Dr. Snow had planned to do
8 initially. The right-hand column is instead what Dr. Snow
9 eventually did, and that would be after his change in
10 assignment.

11 Q. Okay. Let's start with the left-hand column. Would you
12 describe what Dr. Snow planned to do.

13 A. Right. So my understanding of what Dr. Snow set out to
14 do is to, step one, draw a defendant sample; step two,
15 estimate a count-based breach rate. The third consideration
16 is that that was supposed to be for what were deemed
17 at-issue loans, quote, unquote; and then finally to estimate
18 loss on a defendant's breaching loans.

19 Q. And let's turn to the right-hand column. Would you
20 describe what Dr. Snow actually did with his protocol.

21 A. Right. So with the sampling and damages methodology
22 that Dr. Snow puts forward, there's both the defendant
23 sample, but also a global sample. Instead of using
24 count-based breach rates, there's a use of loss-weighted
25 breach rates. It's also true that that pertains not to all

1 at-issue loans, but instead for subpopulations of those
2 loans.

3 And then finally there's allocation, determining a
4 defendant's share of the five separate settlements, the
5 trust settlement and the four monoline settlements.

6 Q. Okay. I would like to ask you a few questions about the
7 differences between these two columns. First of all, what
8 is the difference between a count-based breach rate and a
9 loss-weighted breach rate?

10 A. Right. So a count-based breach rate is an idea that is
11 rooted in each loan counts equal; that is to say, if I am
12 engaging in a sample scheme, I'll have an equal probability
13 of drawing all loans. If you juxtapose that with loss
14 weighting, the idea is you want to focus on the loans that
15 have greater losses. That would be more consistent
16 withdrawing a sample in a different way using what's
17 sometimes referred to as dollar unit sampling, where the
18 sample would be more inclined to include a loan if it had
19 more losses. If you think of count-based versus
20 loss-weighted, loss-weighted intuitively just gives more
21 weight to loans with more losses.

22 Q. Now, in terms of the margin of error, is there any
23 significance to switching from a count-based to a
24 loss-weighted breach rate?

25 A. There is. So with respect to a sample that is designed

1 to estimate a count-based breach rate, it may be right that
2 you have a particular margin of error that you could hit. A
3 loss-weighted breach rate estimate, however, has an
4 additional source of variability, which is the losses
5 associated with that particular loan.

6 So if you approach the problem in terms of loss
7 weighting and you're using a sample that's actually based on
8 a count-based approach, you have extra slippage; and that's
9 at root why Dr. Snow misses his targets for the margins of
10 error on the breach rate estimate.

11 Q. So which type of breach rate did Dr. Snow ultimately use
12 in his damages calculations?

13 A. In his damages calculation Dr. Snow uses loss-weighted
14 breach rates.

15 Q. Did he use the count-based breach rate as an input into
16 damages?

17 A. No, he did, not as an input into damages.

18 Q. Okay. And how does this shift from count-based breach
19 rates to loss-weighted breach rates by Dr. Snow relate to
20 the first pillar of sampling?

21 A. Well, if you had started by asking the question what am
22 I going to do with the sample, if the answer was I'm going
23 to estimate damages, then that would have led to a different
24 sampling scheme. In particular, I touched upon this
25 earlier. There's a concept of dollar unit sampling where

1 you would say instead of having each loan have an equal
2 chance of getting selected into your sample, maybe a loan
3 should have a chance of getting selected into the sample
4 that's proportional to the loss associated with that loan.
5 And that's a common approach and that would be referred to
6 as dollar unit sampling in the sense of losses being
7 measured in dollars.

8 Q. So if he had used dollar unit sampling, could Dr. Snow
9 have designed his samples to guarantee a loss-weighted
10 breach rate with a particular margin of error?

11 A. Yes.

12 Q. And earlier you said you reviewed Dr. Snow's trial
13 testimony; is that right?

14 A. Yes.

15 Q. And do you have an understanding of why he didn't use
16 dollar unit sampling here?

17 A. I think he described that as being rooted in two
18 different ideas. One is count-based is what he was used to
19 doing; and then the other was that it was his view that that
20 might lead to some problems with respect to the replacement
21 of loans in the event of a determination by a reunderwriter
22 that a loan was not re-underwritable.

23 Q. Now, focusing on the second issue, the replacement of
24 loans, do you have a view on whether Dr. Snow is correct
25 about that?

1 A. I do. It's my view that Dr. Snow is incorrect on that
2 point.

3 Q. And can you explain why that is?

4 A. Yes. So the replacement idea works as follows: If a
5 reunderwriter determines that a particular loan is not
6 re-underwritable, the idea of the backup sample is you would
7 then replace that loan with one from the backup sample; and
8 that has some challenges associated with it in terms of
9 statistical principles, but that's the basic idea that
10 Dr. Snow had regarding his backup samples.

11 If he had instead done something like dollar unit
12 sampling, the idea is essentially the exact same. So if
13 there's a loan that the reunderwriter determined was not
14 re-underwritable, let's suppose that loan had \$100,000 in
15 losses. You would then turn to the backup sample. The
16 backup sample would be shuffled in a random order, and you
17 would then proceed down the list sampling additional loans
18 until you had gotten a total amount of replacement loans
19 that exceeded \$100,000 in losses.

20 Q. Now, would it have been a problem if the losses on the
21 backup sample loans exceeded the losses on the original loan
22 that you were replacing?

23 A. No. Let me walk you through two simple ways that this
24 would work, and I will go back to my hypothetical of the
25 loan that's to be replaced has loss of \$100,000. Here's one

1 very simple scenario.

2 You turn to the first loan in the backup sample
3 and it turns out that loan has \$100,000 of loss also, so
4 then you draw that loan in. The other possibility is that
5 it's got an amount of loss that's in excess of 100,000, and
6 in that case you say -- you add it to the list. You
7 actually have additional precision by virtue of the fact
8 that it has additional loss, more than you are looking to
9 get with it.

10 The third possibility is that the first loan that
11 you're turning to in the backup sample actually doesn't have
12 \$100,000. So, in other words, we've gone through \$100,000
13 exactly, above \$100,000, and below. In the event that it's
14 below, you simply turn to the next loan in question until
15 the total amount of loans that have been replaced is at
16 least equal to \$100,000.

17 And in that case what happens when your total
18 amount of loss exceeds \$100,000 is the same as in the
19 scenario I told you before. You have a total amount of loss
20 that's above your target which leads to better precision,
21 not worse. It's actually very simpler -- very simple in
22 terms of how the process is to be adjusted and is one that I
23 would have expected him to have done.

24 Q. And I think you mentioned that there was another reason
25 why Dr. Snow didn't use dollar unit sampling. What's your

1 understanding of that reason?

2 A. So this is somewhat flimsier in terms of its support,
3 but he simply said that that's what he had done before. I
4 would have said that the better approach to sampling is to
5 actually start from the science and not necessarily simply
6 do something that one had done before.

7 Q. And a couple times today you've mentioned the term
8 "at-issue loans". Is that a statistical term?

9 A. No, that's not, and when -- when I'm careful, I'll try
10 to say, quote, at-issue, unquote. That's a term that I
11 believe somehow emerged in the conversation about assignment
12 perhaps with counsel, but is instead a designation of a
13 subpopulation of the loans as being, quote, at-issue,
14 unquote.

15 I'm not -- you know, I don't have a view as to
16 what's legally at issue, but my understanding is that that's
17 broader and that that's all of the loans that would be in
18 settlements, the trust or the monoline settlements.

19 Q. Okay. And do you have an understanding of what the term
20 "at-issue" loans means?

21 A. Yes. So it's defined in Dr. Snow's reports. So the
22 definition that he adopts is there have to be at least \$500
23 of actual losses or the loan has to be 90 days plus
24 delinquent or in foreclosure or real estate owned.

25 Q. Okay. And how did Dr. Snow's assignment change with

1 respect to these at-issue loans?

2 A. So it's my understanding that he was instructed to focus
3 on the at-issue loans. If you think of the broader set of
4 loans that are at issue, there are attempts that one could
5 make later to recover from that misstep with respect to
6 designating a subpopulation as being of interest instead of
7 the population, but it's my understanding that there was not
8 an attempt made to go back and to resample the portion of
9 the population that was omitted in the first instance.

10 Q. I think you referred to "subpopulations". What's the
11 significance of the fact that Dr. Snow shifted from all
12 at-issue loans to just subpopulations of at-issue loans?

13 A. Well, what it does is it means that there's a slippage
14 with respect to the numbers that he comes up with. They
15 actually are not correct for the relevant population. So if
16 you think of the context that we're in, it's hard to justify
17 sampling from the wrong population when you could sample
18 from the correct population, and that's what was done here.

19 That would obligate a statistician to point out,
20 well, here are the bottom-line implication for my numbers of
21 having sampled from the wrong population, and that can be
22 done and I've described that.

23 Q. Now, with respect to subpopulations of loans, is there
24 any particular issue that comes up with respect to the
25 monoline estimates?

1 A. Well, the monoline settlements themselves are a
2 different type of issue altogether in the sense of the
3 samples that Dr. Snow drew were not focused on the question
4 of separate settlements; but when he goes to actually
5 approach the monoline settlements, he uses the sample that
6 he drew for other purposes and examines the subset of loans
7 that happen to fall into the monoline settlements and that
8 leads to quite a bit of difficulty statistically.

9 Q. Let's talk specifically about Dr. Snow's methodology for
10 allocating the trust settlement. Okay?

11 A. Okay.

12 Q. Now, did you create some slides regarding the trust
13 settlement?

14 A. I did.

15 Q. Okay. And we'll go through those one by one, but at a
16 high level, is it your opinion that Dr. Snow's analysis of
17 the trust settlement violates the pillars that we've been
18 discussing?

19 A. It's my view that it violates three of the pillars.
20 It's not as unworkable as the monoline settlement approach,
21 but it is an approach that has some problems associated with
22 it.

23 Q. Okay. And let's start with the second pillar, actually.
24 Did Dr. Snow draw his samples from the correct population
25 for purposes of allocating the trust settlement?

1 A. No, he did not.

2 Q. Why is that?

3 A. Well, if you think of the issue that we were just
4 talking about, the quote, at-issue, unquote, loans, that's a
5 subset of the loans that are covered by the settlements; and
6 so from that perspective from the start Dr. Snow's samples
7 are drawn from the wrong population.

8 Q. And is there any way in which Dr. Snow's samples are
9 overinclusive with respect to the trust settlement?

10 A. With respect to the trust settlement, yes. So you could
11 describe Dr. Snow's samples as being both underinclusive and
12 overinclusive, but overinclusive in the sense of some of the
13 loans are actually not covered by the trust settlement.

14 Q. And did you create a slide regarding whether Dr. Snow's
15 sampled from the wrong population?

16 A. I did.

17 Q. Let's look at slide 17.15, please.

18 A. Yes, I'm there.

19 Q. Okay. And at a high level, would you explain what this
20 slide shows.

21 A. Yes. So this slide is showing a count of loans where
22 available, total losses associated with those loans, and the
23 percentage of total losses associated with those loans for
24 four different groups. The first is what Dr. Snow
25 designates, quote, at-issue, unquote, loans. The second

1 category is loans that were already paid in full. I forget
2 the exact label. I believe it's May 2013. The third
3 category is loans that were performing but were not included
4 in the at-issue loans, so in that category. And then
5 finally, the nondebtor-sponsored trusts, and that's in the
6 fourth row of the table.

7 Q. And you see the title there "Bankruptcy Population"?

8 A. Yes.

9 Q. And what does that mean?

10 A. That means that, it's my understanding, that all of the
11 loans that are in all four of those groups would form
12 instead the correct population for this matter.

13 Q. And I think you mentioned the first category was
14 "At-Issue" Loans. How many loans were in that category?

15 A. So as the chart shows, approximately 463,000.

16 Q. And what were the total losses on those loans?

17 A. Total losses, \$42.289 billion.

18 Q. And just for clarity, where do those loss figures come
19 from?

20 A. Those parallel what I reported on before; that is to
21 say, I'm taking Dr. Snow's numbers for losses.

22 Q. And the second category of loans here, "Paid-in-Full,"
23 how many loans were in that category and what were the
24 losses?

25 A. So that's 1.3 million loans, so many more than the

1 "at-issue" loans, but of course since they're paid in full,
2 they have zero losses.

3 Q. And the third category, "Performing Loans," how many
4 loans were in that category?

5 A. Performing loans, there's approximately 237,000 and they
6 have total losses of 897 or 898 million.

7 Q. And the fourth category of loans, "NDS Trusts" loans,
8 did Dr. Snow ever identify how many loans were in that
9 category?

10 A. No, I don't believe that he did. However, there are
11 aggregated losses associated with those that Dr. Snow has
12 put forward, and that's \$1.687 billion.

13 Q. Okay. And if you wanted to allocate the bankruptcy
14 settlements based on breaching losses, what population of
15 loans would you sample from?

16 A. Well, if you were looking for an allocation approach for
17 the overall set of loans and you wanted to focus on losses,
18 you would look at the, quote, at-issue, unquote, loans. You
19 would neglect the paid-in-full loans since there were no
20 losses associated with them. You would turn to the
21 performing loans and then the NDS loans. So those three
22 groupings.

23 Q. And in the paid-in-full loans, would you need to look at
24 them for any purpose?

25 A. You wouldn't need to look at them unless you were

1 focusing instead on something like what Dr. Snow has done
2 with respect to his a count-based approach. In that
3 context, it's of course right that the argument regarding
4 them having zero losses would say not be as relevant.

5 Q. Okay. And did Dr. Snow draw his samples here from the
6 full populations of loans with losses?

7 A. No. What Dr. Snow does is he samples loans only from
8 that first line group, the, quote, at-issue, unquote, loans.

9 Q. And in your view, was it an error for Dr. Snow to sample
10 just from the at-issue loans?

11 A. I think it is an error. I think it's very hard to
12 justify drawing your samples from the wrong population. I
13 think that in this context the better course of action would
14 be to ask what is the sample actually going to be used for;
15 and if the answer to that question is it's supposed to cover
16 all of the bankruptcy settlement, I don't really see the
17 justification for focusing on a subset.

18 Q. You've said several times that you reviewed Dr. Snow's
19 trial testimony. From that testimony, do you have an
20 understanding of why he sampled from just these at-issue
21 loans?

22 A. Yes. It's my understanding from his testimony that he
23 was told to make an assumption that that was the population
24 of interest.

25 Q. In his testimony, did you see any statistical

1 justification from sampling from just the at-issue loans?

2 A. No. I don't think there could be a statistical
3 justification for sampling only from the, quote, at-issue,
4 unquote, loans.

5 Q. Okay. In looking at your slide here, what percentage of
6 the losses across the RFC and NDS trusts were associated
7 with the at-issue loans?

8 A. The at-issue loans are 94.2 percent of the total losses
9 for all of the bankruptcy population.

10 Q. And does that affect your view of whether it was correct
11 for Dr. Snow to sample from just the at-issue loans?

12 A. No. So, again, it's true that 94 percent is not as bad
13 as if that was a much lower number. At the same time, it's
14 hard to understand why you should sample from the wrong
15 population when you could sample from the correct one.

16 Q. And suppose that Dr. Snow had sampled from the full
17 population of loans with losses. Would that have required
18 him to draw larger samples?

19 A. No. I would have expected him in that context that he
20 would have instead just focused his same sample size on the
21 correct population as opposed to the wrong population.

22 Q. Okay. And when you issued your reports during the First
23 Wave of these cases, did you raise the issue that Dr. Snow
24 had sampled from the wrong population?

25 A. I did.

1 Q. And then when you issued your report in this case, did
2 you again raise that issue?

3 A. I did.

4 Q. And at any point did Dr. Snow go back and sample from
5 the performing loans or the NDS Trust loans?

6 A. No, I don't believe so.

7 Q. Okay. What did Dr. Snow do in response to your point
8 about sampling from the wrong population?

9 A. Well, to a certain extent, Dr. Snow assesses something
10 like a bounding analysis such as that that I described
11 initially.

12 Q. And as part of that bounding analysis, does he make
13 certain assumptions?

14 A. Yes.

15 Q. Okay. And have you prepared a slide regarding
16 Dr. Snow's analyses, or at least some of those analyses?

17 A. Yes, I have.

18 Q. Okay. Let's look at slide 17.16, please.

19 A. Yes. I'm there.

20 Q. Could you describe for us the first line here that
21 refers to 100 percent NDS Breach Rate.

22 A. Yes. So one of the adjustments that Dr. Snow considers
23 is he tries to take account of the fact that the population
24 was, in fact, a subpopulation by augmenting the loan
25 population with the NDS loan population, but making an

1 assumption regarding what the breach rate would have been
2 for those loans.

3 He estimates something -- or rather, he makes an
4 assumption, really, to borrow information from other samples
5 that he doesn't have regarding NDS loans, and uses a breach
6 rate estimate of 60.4 percent.

7 And that's actually not the maximal impact of
8 failing to sample from the NDS loans. Instead, the maximal
9 impact of failing to sample from the NDS loans is what I've
10 laid out here in the first row, and that's labeled
11 "100 Percent NDS Breach Rate."

12 Then the rest of the table describes Dr. Snow's
13 estimate, what the adjusted estimate is if you instead use
14 100 percent for the NDS breach rate, the impact of that, and
15 then the percentage change, and that's for the first row.

16 Q. And what is the impact of that analysis?

17 A. The impact of that analysis for PRMI's damages would be
18 a decline in damages, according to Dr. Snow's methodology,
19 of \$125,000.

20 Q. Okay. And earlier in the trial Dr. Snow testified that
21 it was reasonable to assume that the NDS trusts had the same
22 breach rates as RFC's trusts based on his review of Duff &
23 Phelps' analysis in the bankruptcy. Do you have a reaction
24 to that?

25 A. I did. I was surprised by that when I first encountered

1 it and so I looked into that. Duff & Phelps didn't sample
2 from the NDS trusts either, so there's actually no support
3 for that contention as far as I understand it. So instead
4 what's true is that there is an attempt to borrow
5 information, so to speak, but that borrowing is something
6 that essentially makes up an assumption that doesn't have
7 any support with which I'm aware.

8 Q. So just to be clear, what population of loans was Duff &
9 Phelps looking at?

10 A. So Duff & Phelps was involved, is my understanding, in
11 the earlier phase of the litigation. They were looking at a
12 set of loans that weren't loans that corresponded to the NDS
13 loans.

14 Q. Okay. In his trial testimony Dr. Snow also mentioned
15 that the NDS trusts and the RFC trusts were similar in terms
16 of vintage and product type. Does that support an
17 assumption, in your view, that the NDS trusts and the RFC
18 trusts had the same breach rate?

19 A. No. So statistics as a science is not one where we say
20 we're going to advance an estimate because we might get
21 lucky and it's right. Instead we advance an estimate and
22 describe here are the reasons why this is likely to be the
23 correct number; or if there is sampling uncertainty
24 associated with that number, we say here's the likely range
25 that's attributable to the sampling uncertainty.

1 It's inappropriate for there to be an assertion of
2 similarity based on two simple variables. For example, if
3 you thought of it the other way around, that is to say, is
4 it right that I know that two different subpopulations are
5 likely to be the same, it would be easy to reject that type
6 of assumption. If you look in the real world, it's rarely
7 right that two subpopulations are exactly right, and so to
8 assert that when I found two things that are the same,
9 therefore I know that those subpopulations are exactly
10 right, in my mind that's simply a mistake.

11 If you will, we could go back to the Minnesota
12 poverty rate example. If -- so I was born in Minnesota and
13 then moved to Alabama. I can tell you they are two really
14 different places. If you went about trying to figure out
15 something about Minnesota versus Alabama, you could try to
16 talk about those two different places and you could try to
17 make a case somehow that Alabama and Minnesota are the same,
18 so that somehow you could take, for example, an estimated
19 poverty rate for Alabama and impute that to Minnesota.

20 It would not be an approach that I would
21 recommend. I would think it would be right that it would be
22 easy to find, however, two variables that were similar
23 between Alabama and Minnesota, even if it's right that the
24 bottom line number is very different. And here I think that
25 that's basically what's happening. That is to say, you have

1 two variables that may be similar between the NDS loans and
2 the other loans, but that doesn't establish that everything
3 is similar. In particular, I wouldn't think that it would
4 be right that that would be something that would allow you
5 to get away from an examination of representations and
6 warranties as an example.

7 Q. And based on your review of his reports, did Dr. Snow
8 ever analyze whether the NDS trusts and the RFC trusts were
9 similar in terms of representations and warranties?

10 A. No, I don't believe he examined them.

11 Q. Okay. And so let's look back at your slide here. And
12 focusing on the second line, "Alternative Breach Rate
13 Assumptions for Unsampled Loans in RFC Trusts."

14 Dr. McCrary, would you explain what that line shows.

15 A. Yes. So Dr. Snow does something like this analysis, but
16 he doesn't do it correctly. This is a little bit like the
17 first scenario where Dr. Snow had adopted something like a
18 bounding approach to take account of the fact that he had
19 sampled from the wrong population, but he didn't actually do
20 the bound correctly. So the maximal impact that I spelled
21 out in the first row corresponds to assuming a 100 percent
22 NDS breach rate.

23 With respect to the second, here, to have the
24 bound done correctly, you had need to have a zero percent
25 breach rate for PRMI and a 100 percent breach rate for the

1 global loans. And that's actually one of the approaches
2 that Dr. Snow undertakes. He undertakes some others as well
3 that are not actually bounding analyses, just changing those
4 underlying assumptions.

5 And parallel to the first row, the remaining
6 columns basically spell out both his initial estimate, the
7 adjusted estimate, the impact of that, and the percentage of
8 change.

9 Q. And what would be the impact of this bounding analysis
10 in the second line here?

11 A. In the second line the impact of this bounding analysis
12 would be \$207,000.

13 Q. And during his testimony Dr. Snow used the word
14 "extreme" to describe the assumptions under this bounding
15 analysis. Do you have a reaction to that?

16 A. I do. I think that misunderstands the exercise. If you
17 sample from the wrong population as opposed to the correct
18 population, you have to take steps to figure out by how much
19 did that actually adjust your numbers. So of course the
20 better practice would be to avoid bounding altogether and
21 sample from the correct population; but given that the die
22 is cast and Dr. Snow is using his approach, which focuses on
23 the subpopulation, the bounding analysis that I've displayed
24 here is by construction making extreme assumptions because
25 that's the situation in which we find ourselves by virtue of

1 Dr. Snow's approach.

2 Q. And I think you mentioned that Dr. Snow did some other
3 analyses where he assumed other breach rates. Could you
4 describe those analyses?

5 A. Yes. I would have described those analyses as not
6 actually being bounding analyses. Those would instead be
7 attempts to make assumptions about what might be true
8 regarding the unsampled population, and to carry through
9 calculations predicated on those assumptions even if it's
10 right that they were not necessarily supportable.

11 Q. Okay. And as a matter of statistics, do you have an
12 opinion on whether those other analyses are appropriate?

13 A. No, I think that it's right that if you sample from the
14 wrong population, again, the appropriate steps to take are
15 bounding analyses.

16 Q. Okay. Let's look back at your slide one more time.
17 Would you say that the adjustments for Dr. Snow's failure to
18 sample the NDS trusts and these other unsampled loans in the
19 RFC trusts were minor in nature?

20 A. It probably depends on how you think of that. So the
21 final column lists the percentage change; and for the first
22 row that's 2.3 percent and the second row that is
23 3.8 percent. And that's another way of saying that the
24 \$125,000 and the \$207,000 are small relative to Dr. Snow's
25 estimate. That being said, they're not necessarily small.

1 So \$125,000 and \$207,000 are substantial sums of money, of
2 course.

3 So like with many quantity of considerations, it
4 would really depend on how you were thinking about the
5 numbers relative to what is one of the key questions in a
6 quantitative analysis.

7 Q. Now, in his final damages estimate did Dr. Snow make any
8 adjustment for failing to sample from either the NDS trusts
9 or the performing loans?

10 A. No, not in his final damages approach, no.

11 Q. And as a statistician, do you have an opinion on whether
12 it was appropriate for Dr. Snow to make no such adjustment?

13 A. No. It's my view that if you, again, sample from the
14 wrong population, you should instead engage in the bounding
15 analysis to know what's the maximal effect that that could
16 have happened -- that could have had, rather, on the numbers
17 that you're putting forward for the end purpose.

18 Q. Okay. And Dr. McCrary, I would like to switch gears a
19 little bit and talk about your opinions regarding the
20 margins of error on Dr. Snow's trust breach rates. Okay?

21 A. Okay.

22 Q. All right. So just how do the margins of error on his
23 trust breach rates compare to the margins of error that he
24 targeted for his count-based breach rates?

25 A. Well, it's very simple, really. So his targeted margins

1 of error pertain to count-based breach rates. The
2 loss-weighted breach rates stated margins of error are
3 already in excess of that; but for the bottom line damages
4 numbers, what he needs is not breach rate in isolation, but
5 rather the ratio of breach rates, estimated breach rates,
6 for PRMI and the global sample respectively.

7 And it turns out that both that top number and the
8 bottom number are subject to sampling uncertainty, so they
9 each have their own margin of error; but when you take the
10 ratio, the two of them conspire to create a yet larger
11 margin of error. So for the trust settlement overall, the
12 overall margin of error is 26 percent, which is a very wide
13 swing.

14 Q. Okay. And did you prepare a slide regarding the margin
15 of error on Dr. Snow's trust damages estimate?

16 A. I did.

17 Q. Okay. Let's look at slide 17.18.

18 A. Yes.

19 Q. Okay. Would you explain what this slide shows.

20 A. Yes. So a moment ago I testified that Dr. Snow's margin
21 of error associated with the trust settlements is 26
22 percent. That's the number that you see in the upper right
23 in the text box. The chart itself is demonstrating the
24 distribution, and I'll explain that idea in an a little bit,
25 of Dr. Snow's trust damages number.

1 What does the distribution mean? The distribution
2 is something that characterizes where would the numbers have
3 fallen if we had gotten different samples than we actually
4 had. And what the chart shows on the X-axis is different
5 numbers of damages estimates for the trust settlements
6 specifically, and there's a blue curve that you see
7 superimposed that looks a little bit like a bell. The shape
8 of that is approximately what you would describe as a bell
9 curve, and that shows a height that is showing what's the
10 more likely values that you are going to get.

11 You also see three different vertical black lines.
12 The center vertical black line is at Dr. Snow's actual
13 dollar figure, that is to say \$5.098 million, and then the
14 left and the right-hand black vertical lines are showing the
15 lower and upper bounds of what's called a confidence
16 interval. That's the two numbers that a statistician would
17 assert are likely to cover the true number had, instead of a
18 sample, an enumeration of the population had been
19 undertaken.

20 Q. At trial Dr. Snow testified that it's typical to report
21 a margin of error on damages in terms of dollars instead of
22 percents. Do you have a reaction to that?

23 A. I think that really misstates the case. It's frequently
24 right that you would characterize a swing in terms of
25 percents just to understand how to absorb the information.

1 For example, people have been talking a lot about
2 the stock market over the past few days and it would be very
3 common for people to say I don't really understand how big
4 the drop in the Dow was. Was it a 10 percent drop or not?
5 So it would be very common for people to use percents to
6 think about dollars.

7 Q. In your opinion, is an margin of error of plus or minus
8 26 large for a damages estimate like this?

9 A. It is large, yes.

10 Q. And can you give us an example to illustrate that?

11 A. Well, if we think of, for example, the Minnesota
12 Department of Revenue coming to a taxpayer and saying we've
13 estimated that you owe back taxes of \$5,098, and then the
14 taxpayer learns that actually underneath that estimate there
15 was a sample that was used, and that the uncertainty
16 attached to that means that they might owe as little as
17 \$3,836; then I think the taxpayer would be a little bit
18 taken aback at the idea that they had to hand over \$5,098.

19 So from that perspective, I'd say that those kinds
20 of swings with respect to a money demand is something which
21 can be very wide in a concrete context.

22 MR. NESSER: Your Honor, I would move to strike
23 the last answer on the basis that it's a non-disclosed
24 opinion.

25 THE COURT: All right. Can you show me where it's

1 disclosed?

2 MR. NICHOLSON: Your Honor, the concept that he is
3 discussing is discussed in his report at paragraphs -- I
4 believe it's, off the top of my head -- 105 and 106.

5 THE COURT: All right. And which report are we
6 talking about?

7 MR. NICHOLSON: Sure. We're discussing the
8 report -- his rebuttal report, PTX-258, at paragraphs 105 --

9 THE COURT: August 23rd?

10 MR. NICHOLSON: I believe that's correct. Oh, I'm
11 sorry, no, August 9, 2019.

12 THE COURT: Okay. And what paragraphs?

13 MR. NICHOLSON: Right. So paragraph 105, page 39.
14 In terms of PTX, it's 258-42.

15 THE COURT: One minute. Okay. Again, page
16 258-42?

17 MR. NICHOLSON: Sure, yeah.

18 THE COURT: 105?

19 MR. NICHOLSON: Right. So the concept that
20 Dr. McCrary is addressing is the one that he discusses here.
21 Dr. Snow also fails to address the implications of having
22 such a large margin of error of his trust damages estimate.
23 As discussed in the McCrary First Wave rebuttal report,
24 given the wide margins of error for Dr. Snow's trust damages
25 estimate, one can have little certainty that his pooling

1 estimate represents the actual damages.

2 And so what Dr. McCrary was just discussing there
3 was just a real world example of how that would play out.

4 THE COURT: Let me take a minute to read paragraph
5 105.

6 MR. NICHOLSON: Sure.

7 (Pause in proceedings.)

8 MR. NICHOLSON: The example Your Honor --

9 THE COURT: Let me --

10 MR. NICHOLSON: Sure.

11 (Pause in proceedings.)

12 THE COURT: Okay.

13 MR. NICHOLSON: The example he was using to
14 illustrate that about the Minnesota Department of Revenue is
15 the exact same example he used at the *HLC* trial and there
16 was no objection there. It's simply an illustrative example
17 to describe this conceptual point that he is making.
18 There's no basis for a motion to strike.

19 THE COURT: Mr. Nesser.

20 MR. NESSER: Your Honor, the example was never
21 disclosed. The fact that Mr. Rand in a context of a jury
22 trial where there were many objections being made chose not
23 to object to that one I don't think is relevant here.

24 THE COURT: All right. I think it's fair. You
25 can ask him about the sample -- what he describes as an

1 example in his report.

2 MR. NICHOLSON: And I will.

3 THE COURT: All right. Well, then I think the
4 objection is well taken and that portion of the testimony is
5 struck.

6 BY MR. NICHOLSON:

7 Q. So, Dr. McCrary, I guess at a conceptual level, does the
8 margin of error on a damages estimate go only to precision
9 and not reliability?

10 A. No. What I would say instead is that the wider the
11 margin of error, the lower the degree of confidence that you
12 have in the estimate itself.

13 Q. Okay. And earlier at the trial I think Dr. Snow
14 testified that his point estimate was the most likely
15 estimate of damages. I believe those were the words he
16 used. Do you have a reaction to that?

17 A. Yes. It's my view that that misunderstands the broader
18 context in which a statistical quantity is going to be used.
19 What Dr. Snow meant by that I think is a simple mathematical
20 statement, which is I don't think he was saying anything
21 more complicated than the blue curve has a peak that is
22 close to his estimate. That, however, entirely ignores the
23 broader context in which that number is going to be used.

24 So there is an asymmetry with respect to mistakes
25 with respect to getting a number that's below or above a

1 particular number. It's more consequential for, of course,
2 those to whom money demand is being made if the number is
3 big as opposed to small.

4 Q. And in your professional experience, have you seen ways
5 that parties have addressed damages estimates that have
6 large margins of error?

7 A. Yes, I have.

8 Q. And can you give us an example that you're familiar
9 with.

10 A. Sure. So a simple real-world example of this is CMS
11 audits. So if CMS goes to a hospital and says we've been
12 engaged in some investigations; part of those investigations
13 involve sampling. On the basis of those investigations
14 we've determined that this is the dollar amount that you owe
15 back to the government. What they do in that context is
16 they internalize, if you will, the costs of imprecision
17 associated with their own decision about how large of a
18 sample to undertake.

19 So in particular, they don't assess the hospital
20 in that context with their estimate of what the hospital
21 owes. Instead what they do is they take a percentile at the
22 lower edge of the distribution of the sample.

23 Q. And what percentile do they take, or percentiles?

24 A. They have been inconsistent about this from
25 investigation to investigation. Their manual or handbook

1 states that they are to take 10 percent of -- the 10th
2 percentile specifically, but I also have experience in which
3 they've actually asserted that the 5th percentile is instead
4 what's owed.

5 Q. Okay. And did you create a slide showing how the CMS
6 approach would apply to Dr. Snow's estimate of trust
7 damages?

8 A. I did.

9 Q. Okay. Let's look at slide 17.19, please.

10 A. I'm there.

11 Q. Okay. Dr. McCrary, would you briefly describe what this
12 slide shows.

13 A. This slide is parallel to the prior slide. The X-axis
14 corresponds to a dollar amount. The blue curve is
15 Dr. Snow's estimated sampling distribution associated with
16 the trust damages number; and the black vertical bars are
17 superimposed at the 5th and 10th percentiles of that
18 sampling distribution respectively. So rather than the
19 \$5.089 million figure that was Dr. Snow's estimate, the CMS
20 approach would be \$4.26 million or \$4.023 million.

21 Q. Okay. And just let me -- just for clarification, let me
22 ask you a question about the distribution here. Does this
23 include any adjustment for the failure to sample from the
24 performing loans or the NDS trusts?

25 A. No, it does not.

1 Q. And just in general, if one were to make the adjustments
2 for the performing loans or the NDS trusts, how would that
3 affect the 5th and 10th percentiles here just directionally?

4 A. It would move them to the left; that is to say, they
5 would be adjusted down. The same would hold, for example,
6 with respect to the relative strength of claims and defenses
7 point.

8 MR. NICHOLSON: Your Honor, I'm moving on to a new
9 unit. I just wanted to advise the Court of that in case you
10 would like to --

11 THE COURT: We could take our afternoon break.
12 The good news, I don't know if this is good news for
13 Dr. McCrary, but the good news is that the Southern District
14 of New York has agreed to go until 6:00 p.m. his time, or
15 5:00 p.m. our time. So that's very kind of them, and I will
16 follow up with a personal letter to them. So we will --

17 MR. NICHOLSON: Thank you, Your Honor.

18 THE COURT: -- come back at about 3:15. Court is
19 briefly adjourned.

20 (Recess taken at 3:02 p.m.)

21 * * * * *

22 (3:20 p.m.)

23 **IN OPEN COURT**

24 THE COURT: Before we start up with Dr. McCrary
25 again, Mr. Nicholson, the chief judge in this district has

1 ordered an emergency meeting for the morning to talk about
2 restrictions in this district related to coronavirus and
3 it's a must show for me.

4 MR. NICHOLSON: Okay.

5 THE COURT: So, I'm not going to go to
6 Minneapolis, but I will appear by phone. The trouble is
7 that we're going to have to start later. I had hoped to
8 start at 8:00 a.m. with Dr. McCrary. Now it looks like we
9 won't start until 9:15 a.m. St. Paul time, which it would be
10 10:15 a.m., Dr. McCrary, your time. I just don't see any
11 way around it. All right?

12 Okay. You may proceed, Mr. Nicholson.

13 BY MR. NICHOLSON:

14 Q. Welcome back, Dr. McCrary. Just to confirm, can you
15 hear and see me okay?

16 A. I can.

17 Q. Okay. Great. I would like to turn to your opinions
18 regarding Dr. Snow's methodology for allocating the monoline
19 settlements. Okay?

20 A. Okay.

21 Q. Now, in your opinion, does Dr. Snow's analysis of the
22 monoline settlements violate any of the pillars that you've
23 been discussing?

24 A. Yes. I believe it violates all five of those pillars.

25 Q. Okay, let's start with the first one. With respect to

1 the monoline settlements, did Dr. Snow design his sampling
2 protocol to answer the right question?

3 A. No, I don't believe that Dr. Snow in designing his
4 sampling protocol had thought of allocation, and I don't
5 think that he had thought of doing so for the monoline
6 settlements specifically. It was designed instead to
7 estimate breach rates for defendants.

8 Q. Just to be clear, are the monoline settlements separate
9 settlements?

10 A. Yes, they're four separate monoline settlements.

11 Q. Okay. And now, did Dr. Snow design his protocol to
12 sample from each of those four separate settlements?

13 A. No, he did not.

14 Q. And, Dr. McCrary, are you familiar with the concept of
15 stratified sampling?

16 A. Yes. Stratified sampling is a common point of
17 discussion in sampling textbooks and would be an approach
18 whereby you would divide up the population and to mutually
19 exclusive and exhaustive groups and then sample within each
20 of those. That might be a particularly appropriate approach
21 in a context such as this where there was a need to approach
22 the five total settlements, that is to say the trust
23 settlement and the four monoline settlements, separately.

24 Q. And so are there advantages to stratifying a sample
25 ahead of time?

1 A. Yes. One --

2 Q. Go ahead.

3 A. Yes. So one example of stratifying ahead of time that
4 can be advantageous is sometimes you know that you're going
5 to have to generate estimates that are specific to subgroups
6 A example of that would be, for example, here where you have
7 a need to allocate for the trust settlement and also for
8 each of the four monoline settlements. There are other
9 technical considerations as well, but that's the leading
10 one.

11 Q. Okay. And did you create a slide regarding the number
12 of loans from each monoline settlement in Dr. Snow's global
13 sample?

14 A. I did.

15 Q. Okay. And let's look at slide 17-22 -- or 17.22.

16 A. I'm there.

17 Q. Great. Would you please explain what this slide shows
18 as it relates to the first and second pillars.

19 A. Yes. With respect to the first and second pillars,
20 asking the right question and drawing the sample so that
21 it's representative of the correct population, the overall
22 global sample is something that has 410 loans in it, and
23 there is a subsample of that that corresponds to monolines.
24 And so in particular, the global monoline subsample has 105
25 loans in it. That's notably smaller, of course, than the

1 overall global sample.

2 But if you are coming back to the point that
3 you've raised in your question a few moments ago, there's
4 not one monoline settlement. There's actually four separate
5 monoline settlements for Ambac, FGIC, MBIA and Syncora; and
6 for those four monoline settlements, the number of loans are
7 45, 38, 22, and zero respectively for the global sample.

8 Q. And are those small samples for each monoline
9 settlement?

10 A. Obviously for Syncora there is literally no information
11 in the global sample, but it's also true that for even the
12 largest of those, the Ambac loans at 45, that's a very small
13 sample size. That's a fragile basis for making a
14 consequential decision.

15 Q. Did you prepare a similar slide with respect to the PRMI
16 sample?

17 A. I did.

18 Q. Let's look at DDX-17.23.

19 A. I'm there.

20 Q. Would you explain what this slide shows in terms of the
21 first and second pillars.

22 A. Yes. This line parallels the prior slide, but it's
23 specific to the PRMI sample as opposed to the global sample.
24 So in the PRMI sample overall there's 150 loans. The
25 monoline subsample of that is only 39 loans. But if you

1 focus on the four separate monoline settlements, they are
2 associated with much smaller sample sizes. For Ambac, FGIC,
3 MBIA, and Syncora, those loan counts are 27, 9, 2, and 1
4 respectively.

5 Q. And again, are these small samples on a monoline-
6 specific basis?

7 A. These are. I would say that these are extraordinarily
8 small. For Syncora, MBIA, and FGIC, you have 1, 2, and 9
9 loans respectively. The largest of the four monolines,
10 Ambac, only has 27 loans, and that itself is in many ways
11 number bound.

12 Q. Now, in connection with his original monoline
13 methodology, how did Dr. Snow estimate his breach rates?

14 A. Well, with respect to Dr. Snow's monoline approach,
15 breach rates are something that could be thought of as
16 having a defendant-specific component, but ultimately
17 there's going to be, with respect to this kind of situation,
18 a challenge that he's going to confront, which is those
19 extraordinarily small sample sizes.

20 So what Dr. Snow elected to do is to ignore the
21 fact that the four monolines are, in fact, four separate
22 settlements and to pool them together to estimate one
23 blended rate overall.

24 Q. And how does he apply that blended breach rate to the
25 specific monoline settlements and pools?

1 A. He applies it to all four of the monoline settlements.
2 So in particular, what that's going to mean is that if you
3 take the example of FGIC with, say, 9 loans, he's going to
4 borrow information from completely different monoline
5 settlements to come up with that blended monoline rate; and
6 then he's going to apply that to FGIC.

7 Q. And how does it apply at a pool level?

8 A. At a pool level it's the same issue. So although there
9 are different pools, he is sampling overall from all of the
10 pools with respect to the global sample. PRMI is only in a
11 subsample -- a subset, rather, of those pools. So PRMI's
12 loans would be reduced, but with respect to the global,
13 there's a mismatch with respect to the PRMI pool definition.

14 Q. So you referred to FGIC. So let's imagine a specific
15 pool that was insured by FGIC. How would the approach work
16 with respect to that specific pool?

17 A. Well, this is parallel to what I was describing a moment
18 ago. For that specific pool, information would be borrowed,
19 in my view inappropriately, from other pools that were not
20 pools in which PRMI had loans, for example, for FGIC, but
21 also information would be borrowed from entirely different
22 monoline settlements, in particular Ambac, MBIA, and
23 Syncora.

24 Q. Earlier we discussed the fifth pillar, which concerns
25 assumptions. Does Dr. Snow's original monoline methodology

1 depend on any assumptions?

2 A. Yes. So the approach that I just described is one that
3 is making an implicit assumption that everything is equal
4 across loan pools and also across monoline settlements.

5 Q. And so can you explain why it is that Dr. Snow's
6 approach relies on that assumption?

7 A. Well, Dr. Snow wouldn't have had to have relied on
8 anything like an assumption if he had instead engaged in
9 monoline stratification, for example, like we touched upon
10 earlier. I believe that he was caught in an awkward
11 position whereby his sample was not up to the task and it
12 was an attempt to repurpose that sample. But I think it's
13 probably correct that when confronted with a sample size of
14 2, for example, if we look at PRMI for MBIA, Dr. Snow
15 wouldn't have tried to come up with a quantity based on a
16 sample size of 2; and in that context he is in many ways
17 making an error that's of a different type, which is to
18 introduce bias into his estimates, but borrowing information
19 from other settlements.

20 Q. Okay. And is there a name in statistics for the type of
21 assumption that Dr. Snow is making here?

22 A. There is. We have technical language in statistics
23 sometimes. So we call that a homogeneity assumption, which
24 just means everything is the same as opposed to being
25 different. When I described this idea for students, I refer

1 to it in plain English instead as the oranges are apples
2 assumption.

3 Q. And why do you call it the oranges are apples
4 assumption?

5 A. Well, all of us know that oranges and apples are two
6 fruits, but that they're not the same thing. And in one
7 context it might be appropriate to make an assumption that
8 the two things are both fruits, for example; but in another
9 context if you were making the assumption that they were
10 equal, that might be wrong. So you would have to justify on
11 a case-by-case basis, assuming that they were equal. So you
12 would have to ask for what purpose am I making that
13 assumption, and does that possibly introduce bias into my
14 underlying estimates.

15 Q. So kind of connecting the two, how is that oranges are
16 apples assumption relate to what Dr. Snow is doing in his
17 monoline analysis?

18 A. Well, in his monoline analysis Dr. Snow is assuming that
19 all four monoline settlements are the same. There is
20 evidence that is strongly against that assumption, but
21 that's the assumption that's being made.

22 Q. And in your opinion, has Dr. Snow offered any evidence
23 to support an assumption that these monoline settlements
24 were the same?

25 A. No, I don't believe that there's any credible

1 information that would support such an assumption.

2 Q. And with respect to settlement factors, can you describe
3 the settlement factors that Dr. Snow applies to the
4 different settlements, the monoline settlements.

5 A. Yes. Dr. Snow's monoline settlement factors themselves
6 vary by a factor of about 10, ranging from below 10 percent
7 up to 90 percent.

8 Q. And what does that tell you with respect to this fifth
9 pillar?

10 A. That tells you that by Dr. Snow's own damages
11 methodology, it's acknowledged that the different monolines
12 are very different from one another, yet there is one breach
13 rate that's estimated overall across the four different
14 monoline settlements.

15 Q. Now, have you done any analysis of whether the breach
16 rates would likely vary across the settlements?

17 A. I have.

18 Q. And at a high level, what did you conclude?

19 A. At a high level, I concluded that there was strong
20 evidence that the different monoline settlements had very
21 different characteristics associated with their loans; and
22 when I examined that evidence, I concluded that I would not
23 have wanted to have made a homogeneity assumption had I been
24 in Dr. Snow's shoes since it seems as though that's
25 contradicted by the available evidence.

1 Q. Okay. Have you prepared some slides regarding this
2 analysis?

3 A. I have.

4 Q. Okay. Let's look at slide 17.28. Let me know when you
5 get there.

6 A. I'm there.

7 Q. Great. So could you please explain what this slide
8 shows.

9 A. Yes. So this is a slide which is showing for the four
10 different monoline settlements the distribution of vintage.
11 "Vintage" refers to the year that the loans were originated.
12 And there are four different pie charts. Rather than walk
13 through them, I can just tell you what the bottom-line
14 conclusion from them is, which is that no one of these pie
15 charts looks like any of the other three; that is to say,
16 they all have very different distributions of vintage.

17 Q. And did you do any investigation of whether differences
18 in vintage matter in terms of breach rates?

19 A. I did.

20 Q. And what did you find?

21 A. I found that for those different vintages, you saw very
22 different estimated breach rates.

23 Q. And were those differences statistically significant?

24 A. They were at all conventional levels. And what that
25 tells you as the bottom line is that vintage is very

1 different across the four different monoline settlements,
2 and it tells you that vintage is itself something that's
3 predictive of breach rates; and yet Dr. Snow estimates a
4 single breach rate across all four monolines. I take that
5 to be contrary to the available evidence.

6 Q. Now, this evidence of breach rates, is that based on
7 plaintiff's reunderwriter or defendant's reunderwriter?

8 A. That's based off plaintiff's re-underwriter.

9 Q. Okay. Now, let's look at slide 17.30, please.

10 A. Yes, I'm there.

11 Q. Okay. Would you explain what this slide shows.

12 A. This slide is parallel to the slide previously, but
13 instead of examining vintage, this looks at product type;
14 that is to say different loan products. And the bottom-line
15 conclusion of these charts is the same as what you saw in
16 the prior slide, which is to say no one of these pie charts
17 looks like the other three.

18 So in particular, product types are different
19 across the different monoline settlements; and I did an
20 analysis that's parallel to the one that you just asked me
21 about regarding vintage in which I examined estimated breach
22 rates according to the different product types and they are
23 themselves very different.

24 Q. And was that based on plaintiff's reunderwriting as
25 well?

1 A. Again, that was based off of plaintiff's reunderwriter;
2 and what you see is that product type, just like vintage, is
3 predictive of strong differences in breach rates and the
4 underlying characteristic itself is different across the
5 four different settlements, suggesting strongly to me that
6 it's an error to assume that the breach rate would be the
7 same across the four different monoline settlements.

8 Q. So in light of all this analysis, would you kind of sum
9 up your final opinion regarding whether Dr. Snow's monoline
10 analysis violates the fifth pillar?

11 A. I would say that these homogeneity assumptions that I've
12 underscored here are implicit rather than explicit in
13 Dr. Snow's approach. Moreover, I would say that they are
14 contrary to the available evidence. So yes, I would say
15 that that violates the fifth pillar.

16 Q. And does that violation have any implication for the
17 reliability of Dr. Snow's monoline estimate?

18 A. It does. Making an assumption that is not justified can
19 have decisive implications for an analysis; and in
20 particular, would have the consequence of leading the
21 estimates to be biased and would also lead them to have
22 misstated margin of errors; that is to say, the margins of
23 error would not reflect the fact that the assumption was
24 false. That's not how they're calculated.

25 Q. Okay. Let's look at slide 17.32, please.

1 Dr. McCrary, would you explain what this slide
2 shows at a high level.

3 A. Yes. And I touched upon this earlier in my testimony,
4 but this is a depiction of a fact associated with PRMI,
5 which is that there are overall 153 different insured loan
6 pools that the monoline subsamples are drawn from, but PRMI
7 only has loans and payments corresponding to 20 of those 153
8 loan pools. So the orange circle that's depicted here in
9 the chart is a subset of the overall set of 153 insured loan
10 pools.

11 Q. So in terms of Dr. Snow's allocation of damages, which
12 pools are being allocated damages in the PRMI case?

13 A. In the PRMI case, he's allocating PRMI monoline damages
14 only to the 20 insured loan pools; but what's happening is
15 that he's using information from all 153 that correspond to
16 the global sample. And if you look at that, that's a
17 mismatch with respect to the coverage.

18 Q. And how does this issue on this slide relate to the
19 second and fourth pillars?

20 A. Well, with respect to the second pillar, the second
21 pillar says that you want to draw a sample that's
22 representative of the correct population. Here, the correct
23 population for PRMI would have been those 20 pools.

24 If you think of the fourth pillar, the fourth
25 pillar is that your estimate ought to be unbiased, and I

1 would say that both of those would be violated with respect
2 to PRMI and the monoline samples.

3 Q. And based on your review of Dr. Snow's opinions, have
4 you seen any statistical justification for including loans
5 in his samples from pools with either no PRMI loans or no
6 payments?

7 A. No, I don't believe that there could be a statistical
8 justification for that. It's just an error.

9 Q. Okay. And let's look at slide 17.33, please.

10 Dr. McCrary, would you explain what this slide shows.

11 A. Yes. So this tries to depict the implications for the
12 sample sizes if we attend to this last point regarding the
13 relevant pools. So the chart shows sample sizes for the
14 PRMI sample and for the global sample in the first and
15 second columns respectively. The PRMI sample has 150 loans
16 in the full sample. The monoline subsample that Dr. Snow
17 uses has 39 loans associated with it. The monoline
18 subsample from the relevant pools is 27; that is to say,
19 there are 27 loans in that.

20 And the effects for the global sample are more
21 striking. So for the global sample there are 410 loans in
22 the total sample. The monoline subsample, per Dr. Snow, has
23 105 loans; but in the relevant pools there are only 30
24 loans.

25 Q. Okay. And those bottom-line numbers there, 27 and 30,

1 do those refer to blended monoline subsamples?

2 A. Yes. So those are actually across all four of the
3 monoline settlements. So if we focus on specific monoline
4 settlements, the facts are much more striking in terms of
5 the small sample sizes.

6 Q. Okay. And so in terms of pillar two, what's the
7 significance of this slide?

8 A. Well, this slide shows you that by drawing from the
9 incorrect population and instead trying to use a sample that
10 was drawn for a very different purpose, we end up with a
11 scenario where we have 27 PRMI loans and the relevant pools
12 for all four monoline settlements; and for the global sample
13 we end up with 30, again, spread across four different
14 monoline settlements. And those are just unworkably small
15 sample sizes, but that's even more true once we look at
16 specific monoline settlements.

17 Q. Then, Dr. McCrary, let's talk about pillar three
18 concerning margins of error. In your opinion, does
19 Dr. Snow's monoline estimate violate pillar three?

20 A. Yes. Even if you take the numbers on their face, the
21 margin of error associated with the monoline estimate that
22 Dr. Snow puts forth is larger by quite a margin than is the
23 trust settlement number, and yet that stated margin of error
24 is not actually the actual margin of error. The stated
25 margin of error relies on the underlying assumption of

1 homogeneity, which as I hope my testimony today has
2 clarified, is almost surely false.

3 Q. And let's look at slide 17.34, please. And Dr. McCrary,
4 can you describe what this slide shows regarding the margins
5 of error.

6 A. Yes. So the implication of the small sample sizes is
7 that even the reported margins of error that rely upon the
8 homogeneity assumption themselves are much larger than
9 Dr. Snow's target margins of error. So what this slide
10 shows you is what those targets were for the PRMI and global
11 samples, the targeted margin of error was 8 percentage
12 points and 5 percentage points respectively, but the
13 reported margin of error for the loss-weighted monoline
14 breach rate is 19.1 percentage points and 12.4 percentage
15 points for the PRMI and global samples respectively. That
16 is to say, well above their stated goal.

17 Q. And in your view, are these margins of error correct?

18 A. No. It's actually my view that those are themselves
19 understated because they invoke an assumption which is very
20 unlikely to be true.

21 Q. Okay. So in light of all these issues we've discussed,
22 in your view is Dr. Snow's original estimate of the monoline
23 damages usable?

24 A. No. It's my view that while the trust settlement, some
25 adjustments could be made that would render that estimate

1 itself something that was workable, that the monoline
2 estimates themselves are fundamentally unreliable and ought
3 not be used.

4 Q. Okay. And I think you mentioned this earlier, but are
5 you aware that Dr. Snow has now put forward a settlement
6 specific estimate of monoline damages?

7 A. I am.

8 Q. And does that settlement specific estimate change your
9 view on the reliability of his original monoline estimate?

10 A. No, it does not.

11 Q. And why is that?

12 A. Well, for one reason, I would say that my view regarding
13 his original approach is rooted in statistical principles
14 and statistical principles don't change with respect to his
15 new approach.

16 The second reason, though, is that that approach
17 that you are describing relies on different data. So if you
18 look at the approach, it's in my view not correct that that
19 somehow endorses or blesses the original approach that he
20 undertakes.

21 Q. And can you just explain what that change in data is?

22 A. So there are additional loans that he uses with respect
23 to that second approach, and so the underlying comparison is
24 really two things changing at once, not one thing.

25 Q. Okay. And were those loans part of his original sample?

1 A. No, they were not.

2 Q. Okay. Now, let's look at 17.36, please.

3 A. I'm there.

4 Q. Okay. Dr. McCrary, can you explain what this slide
5 shows in terms of the first and third pillars?

6 A. Yes. So this is showing the first and -- sorry. For
7 the PRMI and the global samples, this is showing the
8 settlement specific sample sizes and it's showing them in
9 the entries in the table. So, for example, for Syncora,
10 MBIA, FGIC and Ambac, you see for the PRMI sample we have 1,
11 9, 9, and 27 loans respectively. For MBIA, the 9 is listed
12 as 2 plus 7 because there were 7 new loans associated with
13 MBIA. That's the underlying change that I alluded to a
14 moment ago. And for the global sample, we see sample sizes
15 of 0, 22, 38, and 45 respectively.

16 Q. So how does this relate to the third pillar here?

17 A. The relationship to the third pillar is that if you look
18 at the settlement-specific approach, the sample sizes
19 undergirding those are very small and that would be a flimsy
20 basis for coming up with an estimate. Margins of error,
21 even those that are reported are large, but if they were
22 calculated accurately, they would be yet larger in my view.

23 Q. Let's look at slide 17.37, please. Dr. McCrary, would
24 you explain what this slide shows.

25 A. Yes. So if you look at those two slides, those two

1 slides are parallel to one another. The focus here is on
2 the relevant pools as opposed to overall. So for Syncora
3 and MBIA and the PRMI sample, you don't see a change with
4 respect to the underlying entries; that is to say, there is
5 one loan corresponding to Syncora, 9 for MBIA, the 2 as well
6 as the new 7, but for FGIC and Ambac the relevant sample
7 sizes fall to 5 and 19 respectively. And for the global
8 sample, Syncora remains at 0 loans, but MBIA, FGIC and Ambac
9 have 16, 4, and 10 loans respectively in the relevant pools.

10 Q. So in relation to pillar two, what's the significance of
11 this slide?

12 A. Well, again, pillar two is to draw your sample from the
13 correct population and for your sample to be representative
14 of that population. For the monolines, it's very hard for
15 me to understand why there would be a population that would
16 be any different from PRMI than the relevant pools that
17 corresponded to PRMI. So that would be the appropriate
18 notion of the population and that's not what the samples are
19 actually drawn from.

20 Q. Okay. In your opinion, are Dr. Snow's samples
21 sufficient to estimate settlement-specific damages in a
22 reliable manner?

23 A. No. I don't think that for the monoline methodologies
24 that depend upon sampling that they can be rescued. I think
25 that they are just fundamentally unreliable and ought not be

1 used. That's my view.

2 Q. Okay. And now let's talk about Dr. Snow's new
3 non-extrapolated estimated monoline damages. In your
4 opinion, does that non-extrapolated estimate show that his
5 original monoline estimate is reliable?

6 A. No. Again, so we know from statistical principles that
7 that first approach is not reliable. That's not a good
8 basis for making a serious decision. At the same time, the
9 non-extrapolated numbers don't rely on sampling. So that
10 might be a workable approach for estimating monoline
11 damages.

12 Q. And is there any reason why you think it wouldn't be
13 appropriate to compare the non-extrapolated estimate to his
14 original estimate?

15 A. Well, again, I think that if you're using different
16 data, I think that you're going to get different
17 conclusions, but I think the core point is comparing the two
18 and somehow thinking that that leads to a conclusion that an
19 approach that we know is not reliable is somehow endorsed,
20 that's just simply not how statistics works.

21 Q. Okay. And before we conclude, I would like to ask you
22 just a few -- for your reaction to a few more parts of
23 Dr. Snow's testimony.

24 Dr. Snow testified that sampling on a pool-by-pool
25 basis would have required more than 10,000 loans. Do you

1 have a reaction to that?

2 A. I don't think that that's necessarily -- I don't think
3 that that's that realistic. I think that the sampling on a
4 settlement-by-settlement basis would have been very
5 practical, and something like that might have been not just
6 practical, but might have handled a large number of
7 different issues and challenges that Dr. Snow ran into.

8 Q. Okay. How many global sample loans would Dr. Snow have
9 needed had he drawn settlement-specific samples?

10 A. Using his own approach, when I calculated that figure,
11 it was approximately 1,300 loans. In other words, much
12 lower than 10,000.

13 Q. Okay. And suppose that Dr. Snow had drawn those global
14 sample loans back in 2016, do you have an opinion on whether
15 he could have used them in other cases?

16 A. Yes, it's my understanding that in the early round of
17 cases there were some 20 different cases pending, and of
18 course it's right that the global sample was to be used with
19 respect to any particular defendant.

20 MR. NESSER: Objection, Your Honor. I move to
21 strike that answer on the basis that --

22 THE COURT: Is your mic on?

23 MR. NESSER: I'm sorry, Your Honor. I move to
24 strike that answer. It was effectively an opinion about
25 what would have been procedurally permitted by Your Honor.

1 THE COURT: Has this opinion been disclosed?

2 MR. NICHOLSON: I think so, Your Honor. He's
3 discussed his opinion about like how many you would have to
4 sample on a settlement-by-settlement basis. We've had many
5 discussions in this case about how there were more -- there
6 was more than one case in 2016 when Dr. Snow drew his global
7 sample. I think it's entirely appropriate for Dr. McCrary
8 to respond to Dr. Snow on that point and say that had you
9 drawn these global sample loans, you could have used them in
10 more than one case.

11 THE COURT: Mr. Nesser.

12 MR. NESSER: Dr. McCrary is a statistician. He
13 has no basis to opine on what would have been permissible
14 for Dr. Snow to use or not use under the Case Management
15 Orders entered in this case.

16 MR. NICHOLSON: He's not opining on what would
17 have been permissible under the Case Management Orders.
18 He's saying that if hypothetically he had drawn those loans
19 in 2016, could they have been used in other cases. He's not
20 opining on what the Court would have held about that.

21 MR. NESSER: Your Honor, it was not hypothetical.
22 He literally asked him how many cases were pending at that
23 time.

24 MR. NICHOLSON: And, Your Honor, Dr. Snow has
25 testified on the issue of litigation constraints repeatedly

1 in these cases over and over again. All of those opinions
2 on litigation constraints are premised on his view from
3 counsel about what Your Honor would have held or wouldn't
4 have held had they asked to redesign their sample.

5 So I think it's a bit strange that Dr. Snow is
6 allowed to testify, you know, with leeway on litigation
7 constraints when there's no basis for that other than what
8 apparently plaintiff's counsel has told him, but I can't ask
9 a question that's very simple, which is supposing that he
10 had drawn a global sample loans of 1,300 loans back in 2016,
11 could he have then used them in other cases?

12 MR. NESSER: Your Honor, the constraints that
13 Dr. Snow talked about in his testimony were explicitly
14 characterized as constraints that he understood to exist
15 because they had been communicated to him by counsel.
16 Dr. Snow never opined independently as a statistician on
17 what the procedural and legal constraints were that actually
18 existed in the world as Dr. McCrary is purporting to do now.

19 If the question that Mr. Nicholson is trying to
20 ask Dr. McCrary is whether, you know, in a hypothetical
21 world Dr. Snow could have constructed a different
22 methodology back in 2016 using 1,300 loans, I have no
23 objection to that. But the opinion that Dr. McCrary is
24 purporting to offer now about what would have been
25 procedurally and legally permissible is just not anything he

1 has a basis to opine on.

2 MR. NICHOLSON: Your Honor, Mr. Nesser is
3 completely mischaracterizing the question. I didn't ask him
4 to opine on the procedural propriety of anything. I didn't
5 ask him to opine on what Your Honor would have ruled. I
6 asked exactly what Mr. Nesser is saying is permissible,
7 which is supposing that Dr. Snow had, in fact, drawn these
8 sample loans back in 2016, could he then have used them in
9 other cases. That is an entirely permissible opinion. It
10 doesn't require any speculation about litigation
11 constraints. It's supposing that Dr. Snow had done this.

12 THE COURT: Okay. The question is: "And suppose
13 that Dr. Snow had drawn those global sample loans back in
14 2016, do you have an opinion on whether he could have used
15 them in other cases?"

16 MR. NICHOLSON: That "could he have used them,"
17 I'll take out "do you have an opinion," if that resolves the
18 objection.

19 THE COURT: Well, it would depend on a lot of
20 things that he's not qualified to testify about, right? I
21 think you should -- I'm going to strike this, but I'm going
22 to let you rephrase it so his opinions are limited to his
23 role as a statistician.

24 MR. NICHOLSON: Okay.

25 BY MR. NICHOLSON:

1 Q. So, Dr. McCrary, the global -- let's talk about the
2 global monoline samples, okay? Are those -- were those
3 global monoline samples used in more than just one case?

4 A. Yes.

5 Q. Okay. And they were used in more than just the PRMI
6 case specifically?

7 A. Yes.

8 Q. So if you had more loans in a global monoline sample,
9 they could have been used in other cases as well; is that
10 correct?

11 A. Yes.

12 Q. Okay. Now, Dr. McCrary, I just have one question about
13 the non-extrapolated approach by Dr. Snow. As far as the
14 number of loans that could have been reviewed on that --
15 under that approach, what's the maximum number that
16 plaintiff could have reviewed under a non-extrapolated
17 calculation?

18 A. Well, for the non-extrapolated approach, there's not a
19 need for the global sample, so that's zero. And for PRMI,
20 there's only 95 loans total. So from that perspective --
21 for that approach -- so from that perspective it would be 95
22 loans total, 95 plus zero.

23 Q. Okay. Thank you. Now, just in conclusion, Dr. McCrary,
24 in all -- in light of all of the issues we've been
25 discussing, could you please summarize your final opinions

1 regarding Dr. Snow's sampling and damages methodologies.

2 A. Yes. So in my testimony today I've touched upon three
3 main ideas. The first is that there's no attempt made by
4 Dr. Snow in his methodology to adjust for the differing
5 strengths across the trusts of claims and defenses, and that
6 that leads to bias, and in particular for PRMI that leads
7 their damages estimate to be overstated.

8 Second, for the trust methodology, I have concerns
9 regarding Dr. Snow having drawn from the incorrect
10 population and having conducted a sample that was designed
11 for one purpose and then put to another purpose. That leads
12 to two qualitatively different types of adjustments that I
13 believe are obligatory in that context.

14 The first is a bounding analysis to accommodate
15 the fact that the, quote, at-issue, unquote, loans were not,
16 in fact, the only loans that were at issue. Instead that
17 was all of the loans associated with the bankruptcy
18 settlements, and that type of bounding analysis ought to be
19 done.

20 The second point was that if you look at the
21 margins of error associated with the trust methodology,
22 trust numbers at the end have a margin of error of 26
23 percent, which is a very wide swing. It's my view that the
24 proper approach there is for the designer of the sample to
25 ask for money that's more consistent with the CMS pattern,

1 which is to adjust the numbers downwards so that imprecision
2 associated with the estimate is something the consequences
3 of which are borne by the designer of the sample.

4 Turning to the monoline settlements, my view is
5 that all of the approaches to estimating damages for the
6 monoline settlements that are based on sampling are
7 fundamentally unworkable. When you get down to the actual
8 sample sizes for the relevant pools for the specific
9 monoline settlements, they are shockingly small and ought
10 not to be used for any serious decisions.

11 With respect to figuring out an alternative
12 approach, it is true that Dr. Snow's non-extrapolated
13 approach doesn't rely on sampling and so that might be a
14 workable approach for the Court to consider.

15 MR. NICHOLSON: Thank you, Dr. McCrary.

16 Your Honor, I have no further questions at this
17 time.

18 THE COURT: Thank you, Mr. Nicholson.

19 Mr. Nesser, should we take five minutes while you
20 set up or do you think you can move ahead?

21 MR. NESSER: I think five minutes would be
22 terrific.

23 THE COURT: Okay. We'll take five minutes. We'll
24 be back in five.

25 (Recess taken at 4:00 p.m.)

* * * * *

(4:10 p.m.)

IN OPEN COURT

THE COURT: All right. Are you ready?

THE WITNESS: Yes, Your Honor.

THE COURT: Very good Mr. Nesser.

CROSS-EXAMINATION

BY MR. NESSER:

Q. Good afternoon, Dr. McCrary, from Minnesota.

Dr. McCrary, there's no dispute for purposes of this case that PRMI sold dozens of breaching loans to RFC, correct?

A. That sounds to me like you're asking me about something that's not about statistics. I suppose it would depend on how you define the term "breaching," but I think I know what you mean, which is that there are breaching loans as determined by the plaintiff's re-underwriter.

Q. And what damages should the Court award for those breaching loans?

A. I think you're asking me a question that was not part of my assignment. I was asked to review Dr. Snow's analysis. I've done so, and I have described my views regarding his approach.

Q. Dr. McCrary, you emphasized in your testimony earlier

1 that your research over the last 10 or 15 years addresses
2 real-world problems, right?

3 A. Yes, that's correct.

4 Q. And real-world data?

5 A. That's right. So I draw upon a wide variety of
6 different data sources in my work, that's true.

7 Q. And you, in fact, said that in your career you've
8 written only one theoretical paper regarding statistics,
9 right?

10 A. I think that is what I said, yes.

11 Q. And yet here the scope of your assignment did not
12 encompass, nor did your expert opinion in this matter
13 encompass, advancing what you would describe as an
14 affirmative allocation model, right?

15 A. That's correct. I was not asked to put forward an
16 affirmative damages model myself.

17 Q. Was the decision not to put forward an alternative
18 damages number your decision or counsel's decision or
19 perhaps something in between?

20 A. I just simply wasn't asked to do that.

21 Q. So it was counsel's decision?

22 A. Yes. The assignment that was given to me was simply the
23 assignment. I didn't volunteer that I wanted to estimate
24 damages or anything like that.

25 Q. Why not?

1 A. In an expert engagement I take the assignment as given.
2 So the assignment that is asked for is something that is
3 governed by all kinds of considerations. It's not really
4 part of my domain. Somebody says are you able to execute on
5 the following task and I say, Yes, I am --

6 Q. Right. Because --

7 A. -- or, No, I'm not.

8 Q. Because calculating damages, alternative damages, that
9 would have been a real-world application; that's what you
10 just said is not your domain, right?

11 A. I think I must have gotten turned around on your
12 question. Could you say that again? I think the answer to
13 your question is no, but I might have misunderstood it.

14 Q. Dr. McCrary, as of the date of your testimony in the *HLC*
15 trial, you had not proffered by way of opinion or testimony
16 any damages model on behalf of any of the clients that had
17 engaged you, correct?

18 A. You're talking about the RFC matter generally; and if I
19 understand you right, the answer is, yes, that's right, I
20 had not been asked to do that by any of the defendants.

21 Q. And since the date of your testimony in the *HLC* trial,
22 you have not proffered by way of opinion or testimony any
23 damage model on behalf of any of the clients that have
24 engaged you, correct?

25 A. That's also correct.

1 Q. And, Dr. McCrary, you're not a lawyer?

2 A. No, I'm not a lawyer.

3 Q. And you're not offering any legal opinions here, right?

4 A. No, sir.

5 Q. You're not a bankruptcy expert?

6 A. No, sir.

7 Q. You're not holding yourself out as an expert on the
8 valuation of RMBS claims?

9 A. That's also correct.

10 Q. And it's also correct that you are not holding yourself
11 out as an expert on the valuation of claims more broadly,
12 right?

13 A. That's correct. My expertise is in economics and in
14 statistics.

15 Q. And, Dr. McCrary, you filed a report in what we've been
16 referring to as ResCap's Wave One actions. Do you know what
17 I mean when I use that term?

18 A. I think I do, yes.

19 Q. And you wrote every word of that report, right?

20 A. Yes, I did.

21 Q. You wrote all of the words?

22 A. I did, yes.

23 Q. And putting aside typographical errors or something of
24 that nature, the substance of that report was true at the
25 time you prepared it, right?

1 A. I believe that it was, yes.

2 Q. And that was on October 27, 2017?

3 A. That might be right. I don't remember the date, but
4 I'll take you at your word.

5 Q. And you also testified under oath in a deposition in
6 Wave One, correct?

7 A. I believe that's also correct, yes.

8 Q. And you gave truthful testimony in that deposition?

9 A. Yes.

10 Q. That was November 1, 2018?

11 A. Same as before, I don't remember the date, but I'll take
12 you at your word.

13 Q. And likewise, your expert reports and deposition
14 testimony in the Trust's case against PRMI, those have been
15 truthful and accurate as well as far as you're aware,
16 correct?

17 A. Yes, that's correct.

18 Q. And just for the record, your report in this case was --
19 or your first report in this case was August 9, 2019, and
20 your deposition was October 23, 2019?

21 A. I remember August 9 from Mr. Nicholson's question. I
22 don't remember offhand the date of the deposition, but
23 again, I'll take you at your word.

24 Q. And, Dr. McCrary, you're here as an objective expert,
25 right?

1 A. My obligation is to the trier of fact, that's correct.

2 Q. You're here as an objective expert, yes?

3 A. Yes.

4 Q. And as an objective expert, your role is to describe
5 what kinds of conclusions are supported and what kinds of
6 conclusions are not supported in a neutral way, right?

7 A. I would agree with that, yes.

8 Q. And as part of that, you testified today about pillars
9 of statistics, yes?

10 A. That's correct, my testimony touched upon the five
11 pillars that I talked about.

12 Q. Right. And today you identified five pillars that you
13 say Dr. Snow violated?

14 A. It was a bit more specific than that, but I don't mean
15 to quibble, yes.

16 Q. And sitting here today, you're not aware of a statistics
17 textbook that discusses pillars, right?

18 A. It's not usually the way that the information is
19 presented. I've actually, over the years as I've taught the
20 subject, wondered if I shouldn't actually write a statistics
21 textbook myself, but I've never gotten around to it. I
22 don't think it's right that you could find a textbook that
23 describes the five pillars in the same way that I have, but
24 all five of those pillars are addressed between the lines in
25 virtually every treatise on statistics I've ever

1 encountered.

2 For example, margins of error, unbiasedness,
3 transparency regarding assumptions. Transparency regarding
4 assumptions and justifying them is probably more about
5 applications of statistics, so it might not show up in a
6 textbook as readily as the other two. But the second
7 pillar, for example, that the sample be representative of
8 the population, I think that's probably in every statistics
9 textbook; and the first pillar is probably largely unstated,
10 but in my experience is a very important one.

11 Q. Dr. McCrary, the list of pillars that you identified
12 today and the order you identified them and the words that
13 you used to describe them, that's something that you
14 developed as part of your teaching career, right?

15 A. You know, I don't remember exactly when the first time
16 that I was trying to communicate that. It could have been
17 in the context of teaching or it could have also been more
18 broadly trying to describe the ideas of statistics. I have
19 expertise in statistics and I do find that that can lead
20 people to ask me questions about it, but it's not exactly a
21 subject that excites people, so I have over the years tried
22 to find ways to communicate it effectively and the pillars
23 is one way that I would use to communicate that.

24 Q. Okay. And now, Dr. McCrary, a pillar is like a big,
25 massive, like, foundational heavy thing that doesn't move,

1 right?

2 A. I think we're on the same page, yes.

3 Q. And, in fact, you also testified -- you testified today
4 that statistics is a field of mathematics and a scientific
5 subject, right?

6 A. Some people would say that statistics is a subfield of
7 mathematics, that's correct; and it, of course, is right
8 that it has aspects to it that are technical. I would agree
9 with that.

10 Q. Because you testified today that statistics is a field
11 of mathematics and a scientific subject, right? You used
12 those words.

13 A. I believe you're quoting me accurately. I don't have
14 the transcript in front of me, but I think that's about what
15 I was trying to say, yes.

16 Q. And you said today that statistical principles don't
17 change, right?

18 A. Statistical principles don't change. I suppose some of
19 them might have greater application in one context than in
20 another, but a concept such as the second pillar, you should
21 have a sample that's drawn from the correct population,
22 something like that is foundational and doesn't change.

23 Q. Dr. McCrary, you said about a half an hour ago that
24 statistical principles don't change, right, you used those
25 words?

1 A. Again, I'm not looking at the transcript, but I don't
2 object to the specific word choice. It's probably about
3 what I was trying to say.

4 Q. Okay. And but in any event, when you've made reference
5 to pillars, you've been describing general statistical
6 principles, right?

7 A. Yes, I think that's correct.

8 Q. And those pillars, in other words, describe the core
9 propositions of the field of statistics?

10 A. I wouldn't have said that. I've touched upon, in my
11 discussion with Mr. Nicholson, that there's a wide range of
12 principles of statistics, and not all of them have relevance
13 to Dr. Snow's methodology in this case. I touched upon five
14 pillars that I thought of as particularly problematic for
15 the monoline settlement approach, and it turns out that
16 three of those were also, in my view, a problem with respect
17 to the trust settlements. But I'm not trying to articulate
18 the five settlement -- the five pillars as being somehow
19 exhaustive of the subject of statistics.

20 Q. Dr. McCrary, is it correct to say that the pillars of
21 statistics describe -- the pillars you've discussed describe
22 the core propositions of the field of statistics?

23 A. I was trying to give a clear version of no to that
24 answer. So maybe I should have started out by saying no and
25 allow me to explain. But when you say "the core

1 principles," I take you to mean is that all of the core
2 principles of statistics, and that's not what I'm trying to
3 testify to. I think that would be inaccurate.

4 Q. Because it's important to distinguish between a
5 situation in which we're talking about core principles
6 generally; and on the other hand a situation in which you're
7 talking about the core principles, right? It's important to
8 make that distinction, yes?

9 A. Well, I don't know about -- I don't know that I totally
10 understand your question, but I was drawing a distinction in
11 my mind between the core principles, which I thought of as
12 something like enumeration, which I wasn't trying to do,
13 versus are they core principles. I definitely agree with
14 the statement that they're core principles. I wouldn't have
15 agreed that they were all of the core principles.

16 Q. Okay. But do you agree, sir, that sampling -- that the
17 pillars you've talked about refer to core principles of
18 statistics, yes?

19 A. Yes.

20 Q. Okay. And you've taught statistics in many classrooms,
21 I think you've testified?

22 A. Yes, that's correct. I've taught statistics many times.

23 Q. And you said when you've taught those statistics in
24 classrooms, you've taught -- you've described it as leaning
25 on five pillars. Those were your words today?

1 A. That might be right. And also just to clarify, that
2 being more applicable in some classroom settings than in
3 others. I think it's right that earlier today I testified
4 that it would be particularly relevant in the context of
5 introducing somebody to the field of statistics, and it
6 would be less the point of emphasis in an introductory
7 lecture for, for example, a more advanced class. At the
8 same time in the advanced class you would circle back to the
9 same types of topics.

10 Q. That's fine. And what might be relevant in one
11 classroom might be different in terms of focus, but the core
12 principles of statistics don't change. That was your
13 testimony today, right?

14 A. I believe that summarizes or paraphrases what it was
15 that I said, yes.

16 Q. And in your Wave One report, Dr. McCrary, you said,
17 quote, sampling an extrapolation as a methodology rests on
18 three core propositions. Correct?

19 A. I don't remember the words, but that might be right.

20 Q. And in your deposition in Wave One you testified that,
21 quote, There are three pillars to extrapolation from a
22 sample to a population. Right?

23 A. I don't remember whether or not those are my exact
24 words, but again, I take you at your word.

25 Q. And when you said that sampling an extrapolation rests

1 on three core propositions and three principles, you didn't
2 say they rest on at least three, right?

3 A. No, I didn't.

4 Q. And you didn't --

5 A. Well, better said, I'm not -- I don't have the benefit
6 of looking at the same thing that you said I might have said
7 that later on, but I'm just taking you at your word.

8 Q. Well, why don't we grab it, then. Could you open your
9 Wave One report, which I understand is PTX-217.

10 A. Sure. Happy to. What page do you want me to go to?

11 Q. 15, paragraph 32.

12 A. Oh, I'm sorry. I must be looking at the wrong one.
13 I've got a binder that has several -- can you remind me
14 what's the date of the report under our discussion?

15 Q. October 27, 2017.

16 A. Hum. Yes, paragraph 32. I've got it now.

17 Q. And in paragraph 32 you say, quote, in the second
18 sentence, Sampling an extrapolation as a methodology rests
19 on three core propositions. Right?

20 A. Yes, that is what the sentence reads.

21 Q. Those were your words?

22 A. They were.

23 Q. And you didn't say they rest on at least three core
24 propositions, right?

25 A. I did not, no.

1 Q. And you didn't say there are three core propositions
2 relevant to this case, right?

3 A. No, I did not.

4 Q. Because there's a difference between saying there are
5 three core propositions and here are the three core
6 propositions, right?

7 A. I agree that there's a difference, yes.

8 Q. Okay. And why don't you pull out, please, your
9 transcript from your deposition in Wave One. That's
10 PTX-237.

11 A. Just a moment. The clerk is getting me the... okay.
12 What page?

13 Q. Page 35.

14 A. Okay. Oh, sorry. 35 of the little quadrants?

15 Q. PTX-35.

16 A. No, I know, but there's 35 --

17 Q. Oh, I'm sorry. Yes, it's --

18 A. You know, there's like four little pages.

19 Q. Yeah, yeah, it's 134.

20 A. I actually don't see it on that page. For me, page 134
21 starts with, "In other words, what characteristics
22 directionally were different?"

23 Q. That's right. If you look at -- I'm sorry. Hang on.

24 A. Maybe it's the other 134? No, can't be that.

25 Q. It's at 135, line 7.

1 A. Uh-huh.

2 Q. And what do you say there? You say: "As described in
3 my report, there are three pillars to extrapolation from
4 sample to population and that's as true here as it is in any
5 other scenario." Right?

6 A. Yes, you read that correctly.

7 Q. And you didn't say there are at least three pillars to
8 extrapolation, right?

9 A. No, I didn't. That's not what the words say. On the
10 other hand, if the question had been put to me, Are there
11 other pillars, it's probably right that I would have said
12 there might be. I'm not sure.

13 Q. But that wasn't the question that was put to you, right?

14 A. I don't know actually to be clear. That might have been
15 asked later in the deposition. I don't remember all of the
16 questions that were asked.

17 Q. But what you volunteered in that deposition is that
18 there were three, and you didn't say at least three and you
19 didn't say three relevant to that case. You said three,
20 yes?

21 A. That's right. You've quoted me correctly in terms of
22 both my report and the deposition transcript, at least the
23 page that we were talking about and the paragraph in my
24 report that we were talking about.

25 Q. And you said that's true in that case as in any other

1 scenario, and that's because the principles of statistics
2 don't change, right?

3 A. That's correct.

4 Q. And after identifying the three pillars of statistics in
5 your Wave One report and in your transcript, you went on to
6 opine that Dr. Snow's methodology in Wave One violated all
7 three of those three pillars, right?

8 A. I believe that's correct, yes.

9 Q. Okay. And, Dr. McCrary, you served as a statistics
10 expert in a case called *Lopez vs. Liberty Mutual*?

11 A. I believe that's correct also, yes.

12 Q. And you served an expert report there December 21, 2018
13 under penalty of perjury?

14 A. I'm not sure of the exact date, but I'll take you at
15 your word; and regarding under penalty of perjury, of
16 course.

17 Q. And in an expert report there you said -- in your expert
18 report there you said, quote, Statistical analysis rests on
19 four pillars. Yes?

20 A. I'm not looking at it, but that might be correct.

21 Q. Well, why don't you pull it out. It's PTX-250-5.

22 A. Just a moment. Give the clerk a moment. Let's move
23 this so we don't spill water. PTX-250?

24 Q. Yep, dash 5.

25 A. Dash 5?

1 Q. Yeah, at paragraph 14. Are you there?

2 A. Yes, I am, yes.

3 Q. And you have a big Roman numeral heading there that says
4 "Summary of Opinions," yes?

5 A. Yes, that's right.

6 Q. And then you have paragraph 14, which starts by saying:
7 "Statistical analysis rests on four pillars." Right?

8 A. Yes.

9 Q. Okay. And, again, you didn't say rests on at least four
10 pillars, right?

11 A. No, I did not.

12 Q. And you didn't say there were four pillars that happened
13 to be relevant in *Lopez*, right?

14 A. No, I did not.

15 Q. And you didn't say that in the science and mathematics
16 of statistics there are lots of principles, but there are
17 four of them that happen to be relevant here that you are
18 going to talk about. You said there were a total of four,
19 right?

20 A. No, I didn't say that there were a total of four. The
21 paragraph says what it says. You're not wrong about that,
22 and I didn't give the sort of caveats that you're asking
23 about, no.

24 Q. Right. And in paragraph 15 you then say that the expert
25 -- plaintiff's expert in that case happened to have violated

all four, right?

A. Give me a moment to review paragraph 15.

(Witness reviews document.)

A. Yes, that's correct.

Q. Okay. And now that was -- I think you can now look and can confirm for me. That report was one that you signed again under penalty of perjury on December 21, 2018. Yes?

A. If it's important, I can find the signature page. Give me just a moment.

Q. You can look at the header.

A. Yes, the date is correct, December 21, 2018, and I -- yes.

Q. And I think we established earlier that you testified at trial in the *HLC* case to a jury in this courtroom, or at least the courtroom that I'm in, that there were a big five set of pillars, right?

A. That might be right. I don't remember whether or not I said five or perhaps four.

Q. Okay.

A. I don't recall.

Q. Why don't we pull that out, then. PTX--- well, before we do that, if you don't remember whether you would have said that there are five pillars of the science and statistics or perhaps four?

A. Well, to be clear, and this actually comes up with

1 respect to the paragraph 14 that you were asking me about,
2 as I was looking at the first part that you were quoting
3 from, I was noticing that, for example, the second, third
4 and fourth ones that are listed in paragraph 14 are
5 contained among the five --

6 Q. Yes.

7 A. -- that I have talked about here in the PRMI matter, and
8 the first one that I talk about here is actually about
9 pillar five that I described in PRMI.

10 Q. And --

11 A. The first component of the first pillar that I list in
12 that matter is something that was not an issue in the PRMI
13 case and so I didn't feel any need to articulate it.

14 Q. Right.

15 A. That's another way of saying that this is really a
16 matter of exposition. Sometimes you might combine two ways
17 of thinking about a problem in one pillar, and that's what I
18 did in that report.

19 Q. Okay. And turn then, as we were discussing, to PTX-276,
20 please. And if you can go to PTX-276-21. Are you with me?

21 A. I am.

22 Q. Okay. And at line 12, this was as part of your direct
23 examination by Mr. Smallwood, and at line 12 Mr. Smallwood
24 asked the question: "You list here four principles or four
25 pillars as you've described them. Are there a lot of other

1 core pillars or are these kind of like the big four?"

2 And you answered: "These are, I would say, four
3 of the big five. I would say these are the four that are
4 relevant to Dr. Snow's analysis or in particular to my
5 criticism of Dr. Snow's analysis."

6 Right?

7 A. Yes.

8 Q. I read that correctly?

9 A. I believe you read that correctly, yep.

10 Q. Okay. And you said this morning again that Dr. Snow --
11 and you said this morning that Dr. Snow violated five,
12 right?

13 A. No. I believe that misstates my testimony. I tried to
14 be quite clear that there's a difference between the
15 monoline settlements and the trust settlements.

16 Q. Right.

17 A. For the monolines I think it's right that all five are
18 violated, but for the trust settlements I think that's only
19 three.

20 Q. Okay. And do you recall in *HLC* in trial that you had a
21 demonstrative exhibit in which you talked about pillars?

22 A. I think that that's probably right, but I don't remember
23 offhand the demonstrative that you're thinking of.

24 Q. And --

25 A. I am happy to review it if you would like.

1 Q. -- would you be surprised if I told that you
2 demonstrative listed four pillars?

3 A. No.

4 Q. Because the number of pillars that exist in the world of
5 statistics just depends on which case you happen to be
6 involved in at that time, yeah?

7 A. No, I believe that also is misstating the record. If
8 you look at the articulations that I gave in this matter and
9 the *HLC* matter and the prior report, the *Liberty Mutual* one
10 that you were having me look at, there's extensive overlap
11 in what I articulate.

12 Q. Sure.

13 A. And that was actually part of what I was trying to help
14 you understand with respect to paragraph 14 of *Liberty*
15 *Mutual*.

16 Q. I appreciate that. We will come back to that.

17 Now, in connection with Dr. Snow's trust
18 settlement damages expert, it's your view that Dr. Snow drew
19 his samples from the wrong population in the first instance,
20 yes?

21 A. That's correct, yes.

22 Q. And there should probably be some adjustment, in your
23 view, for the fact of the population being the wrong one in
24 the first instance?

25 A. Yes, that's correct.

1 Q. And in your professional objective expert opinion, that
2 adjustment is minor, correct?

3 A. I think what I said earlier is accurate as I said it at
4 the time, which is it depends on how you view it whether or
5 not that adjustment is minor or not. So 2.3 and 3 ought, I
6 think it's 3.08 percent in terms of the adjustments, are,
7 for example, smaller than 10 percent. Around the same time
8 I talked about a 10 percent market correction.

9 Certainly it's right that those numbers are
10 smaller than 10, but I also tried to emphasize that it
11 depends on perspective and if you talked about the dollar
12 magnitudes associated with that, those might actually be
13 taken to be more consequential depending upon the
14 perspective that you would opt.

15 Q. And the dollar amount that you were talking about when
16 you made that comment was something like \$330,000, give or
17 take. Does that sound about right?

18 A. I think it was \$125,000 and \$207,000, something like
19 that. So, yes, that sounds about right.

20 Q. And so is that -- so what is that? Is that 330? Did I
21 calculate that right?

22 A. 332, I think, but...

23 Q. And is 332 minor or not minor?

24 A. If you ask me for \$332,000, certainly I'm going to
25 consider that to be very consequential. So I suppose it

1 depends upon the context, but I would have said that that's
2 a serious amount of money.

3 Q. In the context of this case, is that dollar amount
4 minor?

5 A. It's not for me to say.

6 Q. Okay.

7 A. So I just simply tried to describe that there are --
8 it's right that there are adjustments that can be made, and
9 I tried to describe the implications of those from a
10 statistical perspective.

11 Q. Dr. McCrary, could you turn to PTX-276, please.

12 A. Got it, yes.

13 Q. That's your trial testimony in *HLC*, right?

14 A. Yes, I believe that's correct.

15 Q. And if you would go to PTX-276-72. I'm sorry. Yeah, I
16 have it right. If you would go to PTX-276-72, and we're on
17 page 2709 of the transcript. Are you with me?

18 A. I think I am, yes.

19 Q. Okay. And on line 16, as part of your direct
20 examination at the *HLC* trial in front of a jury,
21 Mr. Smallwood asked you the question: "I'm going to ask you
22 a different final question. Can you just sum up for the
23 jury your overall opinion as to Dr. Snow's methodology with
24 respect to the trust settlement?"

25 You answered: "Sure. Earlier today I testified

1 that there could be a sample which is drawn from the wrong
2 population that may have some flaws with it that are not
3 fatal, but that require some adjustment. I would have said
4 that in connection with the trust settlement damages
5 estimate, that there should probably be some adjustment.
6 It's minor for the fact of the population is actually the
7 wrong one in the first instance and I've tried to quantify
8 that for the jury."

9 Right?

10 A. Yes.

11 Q. So earlier, a couple minutes ago when you said it's
12 really not for you to say whether dollar amount is minor,
13 you did, in fact, say that it was minor in the *HLC* trial,
14 right?

15 A. I did, yes.

16 Q. Okay. And if you would turn to transcript page 2964 --
17 I'm sorry -- 2694, PTX-276-57. Are you there?

18 A. Uh-huh. I am.

19 Q. And on line 2 you're testifying again as part of your
20 direct examination in front of a jury, and you said: "If
21 you adjust for the fact that there's both the performing
22 loans left out as well as the NDS trusts are left out, that
23 adjusts the estimate down to about 5 and a half million, and
24 so the impact there is, you know, almost \$350,000 or about 6
25 percent."

1 Right?

2 A. Yes.

3 Q. And the \$350,000, that's what you are calling minor in
4 the paragraph we looked at a minute ago, right?

5 A. Yes, that's right.

6 Q. And \$350,000 is more than \$330,000, right?

7 A. That's also correct.

8 Q. Okay. Dr. McCrary, in your opinion, the issue you
9 identified with the wrong population in this case does not
10 render Dr. Snow's trust damages inherently unreliable,
11 right?

12 A. I would have said that, and do say, that if you sample
13 from the wrong population, that does give you an obligation
14 to make adjustments to recover from that initial misstep,
15 but I would have also said, and do say, that you can do that
16 analysis and it moves the numbers, but that doesn't render
17 the underlying approach fundamentally unreliable.

18 Q. Right. And you've done a bounding analysis here, right?

19 A. Yes, that's correct.

20 Q. And that's the bounding analysis that appears I think in
21 your demonstrative DDX-17-16?

22 A. Do you want me to check and make sure you're right?

23 Q. Sure.

24 A. Yes, I believe that's correct.

25 Q. And the bounding analysis that you conducted there, as

1 we said a moment ago, concluded that the maximal impact of
2 the NDS issue and the performing loan issue is \$330,000?

3 A. Yes, I think that -- well, 332, but I don't want to
4 quibble. Yes, that's right.

5 Q. And that number is based on the assumptions that are at
6 the bottom of the page?

7 A. Yes, that's correct. The ones that are listed with the
8 asterisk and the double asterisk.

9 Q. And those assumptions you testified today are not meant
10 to be realistic, right?

11 A. That's correct. The idea of the bounding exercise is
12 not to adopt assumptions that are -- they're different from
13 the assumptions that you would say are characterized in
14 pillar five, for example.

15 Q. Right. So these are not real-world assumptions, right?

16 A. I think that's more of a word play, honestly. I think
17 that what they are is a set of assumptions that are invoked
18 along the way to answering a simple question, which is
19 what's the maximal effect of sampling from the wrong
20 population on the bottom-line numbers.

21 Q. But those are meant to be extreme assumptions, right?

22 A. Well, I don't know if I would have said it that way. I
23 would have said it the way that I just said it now, which is
24 the objective of the bounding analysis is to impute data as
25 opposed to having it. The reason you don't have it is

1 because there was a sample that was conducted from the wrong
2 population. So in that context you have to impute the data
3 in order to understand what's the maximal impact of that
4 misstep; and when you impute the data, it is true that you
5 take the outer edge of what's possible. So it can be taken
6 to the extreme in that sense.

7 Q. Okay. And, in fact, about two hours ago you used the
8 word "extreme" in reference to these assumptions, right?

9 A. I don't recall the specific words, but I'm happy to look
10 back at the testimony if you would like.

11 Q. Okay. And, Dr. McCrary, you're not testifying that the
12 NDS breach rate actually is 100 percent, right?

13 A. No, I'm not.

14 Q. And you're not testifying that PRMI loans excluded from
15 Dr. Snow's sampling population have a zero percent breach
16 rate, right?

17 A. No, I'm not.

18 Q. And you're not testifying that global loans excluded
19 from Dr. Snow's sampling population have a 100 percent
20 breach rate, right?

21 A. No, I'm not. I'm just conducting a bounding analysis.

22 Q. And so if we were to -- and those were extreme
23 assumptions, right?

24 A. They are the assumptions that you need to do in order to
25 conduct a bounding analysis.

1 Q. And they're not meant to be realistic, right?

2 A. That's not their objective, no.

3 Q. Okay. And if one were to actually use reasonable
4 assumptions, one would arrive at an impact of less than
5 \$330,000, right?

6 A. The trouble is one doesn't know what would constitute a
7 reasonable assumption in this context precisely because
8 there weren't any loans from those unsampled populations.

9 Q. But it doesn't matter, right, because any assumption
10 other than the ones you have on this piece of paper would
11 generate an impact lower than \$330,000. Right?

12 A. That's the point of conducting a bounding analysis.

13 Q. Okay. And you don't know what that number actually
14 would be other than to say it's somewhere south of \$330,000?

15 A. That's correct, I don't.

16 Q. Now, Dr. McCrary, loan vintage -- I'm sorry. Hang on.
17 Apologies. Loan vintage and product type are obvious
18 correlates that are associated with the possibility of
19 different breach rates, right?

20 A. Yes, that's right. I would agree with that.

21 Q. And most people paying attention to RMBS litigation
22 generally know that vintages are associated with the
23 likelihood of putative breaches of representations and
24 warranties and similarly for product types, right?

25 A. It's not for me to say what other people know, but I

1 take you to be saying something that's correct.

2 Q. Well, you did, in fact, say that. Right?

3 A. I don't know if that's what I said. It might be, but
4 I'm just trying to be clear about the basis for my opinion.
5 I don't literally know what's in somebody else's head.

6 Q. Well, why don't we open then PTX-266, please.

7 A. Where would you like for me to go? Yes, I am.

8 Q. 266-167.

9 A. I'm there.

10 Q. And we're talking -- there's a question at line 15.

11 This is deposition that you gave in this case, right, in the
12 PRMI --

13 A. Yes, that's correct.

14 Q. And I asked you the question: "Why did you choose to
15 look at vintage and product type in particular." Right?

16 And you said, answer: "There are obvious
17 correlates that are associated with the possibility of
18 different breach rates. They are very different across the
19 different monoline insurers and I found that that was -- and
20 I found that was sufficient to establish the point."

21 Then I asked you: "Are there other obvious
22 correlates associated with different breach rates?"

23 And you answered: "Sitting here today, I'm not
24 thinking of any, but there might be."

25 Then I asked you: "How did you know those were

1 obvious correlates?"

2 And you answered: "I suppose that most people
3 paying attention to RMBS litigation generally know vintages
4 associated with the likelihood of putative breaches of
5 representations and warranties similarly for product types.
6 Suppose I was drawing generally upon my experience in RMBS
7 litigation."

8 Right?

9 A. Yes.

10 Q. And so that's what you said in PRMI. So -- and when you
11 were analyzing -- in fact, what we saw here in this excerpt
12 is that in PRMI when you were analyzing whether breach rates
13 were likely to be different across different monolines, the
14 only loan-level characteristics you looked at were vintage
15 and product type, right?

16 A. I believe that's correct, yes.

17 Q. You set out to do an analysis of those two factors and
18 no other factors, right?

19 A. I don't know that I set out to not do other factors, but
20 those are the factors that I knew that I could draw upon and
21 that I did.

22 Q. You set out to do an analysis of those factors and no
23 other factors, right?

24 A. Again, I'm not sure that that's right. You're asking me
25 about things that happened a long time ago. I did that

1 analysis. I knew that I could draw upon it, and I tried to
2 execute upon that. That's all.

3 Q. Wait a minute. A long time ago. I'm asking about
4 something that you said on October 23, 2019. Why don't you
5 look at line 25 of page that we were just reading from,
6 266-168, and I asked the question: "So you set out to do an
7 analysis of those two factors and no other factors?"

8 You answered: "I believe that's correct, yes."

9 Did I read that correctly?

10 A. I believe you did, yes.

11 Q. Okay. And you've criticized Dr. Snow for not sampling
12 any loans from the NDS trusts to estimate an NDS
13 trust-specific breach rate, yes?

14 A. Yes.

15 Q. And you believe that Dr. Snow therefore has no idea what
16 the breach rates are for loans in the NDS trusts, yes?

17 A. I believe that that overstates it. I would have said
18 that we don't have an estimate for the NDS trusts.

19 Q. You believe it overstates it to say that Dr. Snow has no
20 idea what the breach rates are for loans in the NDS trusts?

21 A. I mean, maybe I'm being overly attentive to your words,
22 but no idea in my mind means like literally no idea and I
23 think that that's an extreme statement. I'm sure he has
24 some idea, but it's not true that he has an estimate of the
25 NDS breach rate.

1 Q. You're not comfortable with the word "no idea"? Why --

2 A. I'm not trying to split hairs. I'm just trying to say
3 the assertion that he has no idea seems to me really strong.
4 At the same time I don't believe it's right that he's put
5 forward an estimate of that.

6 Q. Overly strong, okay. Open, please, 258 -- PTX-258,
7 please.

8 A. Got it. What page?

9 Q. 258, page 38. And if we look at -- are you with me?

10 A. I think so. Which paragraph?

11 Q. And before we go further, so this is your expert report
12 in this case, yeah?

13 A. Yes, this appears to be.

14 Q. Okay. And in paragraph --

15 A. Yeah, I am flipping around in a lot of documents, but I
16 have looked at the cover page and it looks to be the report
17 for this case.

18 Q. Right, and you wrote all the words in this document,
19 right?

20 A. Yes.

21 Q. Okay. And in paragraph 95 down at the bottom of this
22 page in the last sentence you say: -- well, I can read both
23 sentences. You say: "Furthermore, although Dr. Snow
24 allocates a portion of the trust-allowed claim to the NDS
25 trusts as explained above, Dr. Snow did not sample any loans

1 from them to estimate an NDS trust-specific breach rate. He
2 therefore has no idea what the breach rates are for loans in
3 the NDS trusts despite that he allocates a portion of the
4 trust settlement to those trusts."

5 Have I read that correctly?

6 A. You did, yes.

7 Q. Okay. And you're aware, Dr. McCrary, that Dr. Snow has
8 testified that he couldn't get loan-level information on all
9 of the NDS loans, right?

10 A. Yes, I am familiar with some of his testimony in that
11 regard.

12 Q. And you have no reason to doubt that testimony, right?

13 A. I take him at his word, yes.

14 Q. Okay. But Dr. Snow was able to get trust-level data
15 concerning losses and trust-level characteristics in the NDS
16 trusts, right?

17 A. I believe that's correct, yes.

18 Q. And he was able to get information about the loan
19 vintage and the product type of the loans in the NDS trusts,
20 right?

21 A. Yes, that's correct.

22 Q. The same two factors you looked at in your monoline
23 analysis when you set out to conduct that analysis, right?

24 A. Yes, that's right.

25 Q. And Dr. Snow obtained calculations of breach rates for

1 the NDS trusts by loan vintage and product type from the
2 bankruptcy, right?

3 A. Yes, I'm familiar with that.

4 Q. And based on that loan vintage and product type data,
5 Dr. Snow conducted -- concluded -- let me start again.
6 Based on that loan vintage and product type data, Dr. Snow
7 concluded that the loss-weighted trust breach rate is very
8 similar for the RFC and NDS trusts, right?

9 A. I would have said that he concluded that vintage and
10 loan type were similar between them.

11 Q. And sitting here today -- well, but those are the only
12 two factors that you looked at when you set out to conduct
13 an analysis on the monoline issue, right?

14 A. To be clear, I think the right way to understand this is
15 if you're trying to assert that two things are the same,
16 it's easy to disprove that, which is to say you really only
17 need to look at one characteristic if you're trying to argue
18 that one sample is like another. And so it's not the case
19 that it's symmetric in that way.

20 Q. And but it's true, we've established, that when you set
21 out to conduct your monoline analysis, you looked at loan
22 vintage and product type, those two factors and no other
23 factor, yes?

24 A. That's right, yes.

25 Q. And those are the same factors that Dr. Snow looked at

1 in his NDS analysis, right?

2 A. That's correct, they are.

3 Q. And sitting here today, you have no basis to know
4 whether the loans in the NDS trusts have a breach rate above
5 or below the global breach rate that Dr. Snow calculated,
6 right?

7 A. I don't think that anybody has an ability to estimate a
8 breach rate for the NDS trusts because there hasn't been
9 samples taken from them.

10 Q. You have no idea, right?

11 A. As to what? I'm sorry.

12 Q. We can move on. If the breach rate, Dr. McCrary, in the
13 NDS trusts was lower than the breach rate in the global
14 sample, and PRMI's damages under Dr. Snow's allocation
15 methodology would go up, yes?

16 A. That's correct, yes.

17 Q. And let's switch gears unless --

18 MR. NESSER: Are we out of time, Your Honor?

19 THE COURT: Well, I think that that depends. I
20 think the SDNY is thinking we're going to conclude at about
21 6:00 p.m. their time. I know this is hard to do,
22 Mr. Nesser. Is there any way to generally guesstimate how
23 much time you have left on cross?

24 MR. NESSER: I would guess another hour.

25 THE COURT: Okay. I think we're going to be fine.

1 If we don't do closings tomorrow, we can perhaps do them in
2 writing or something, or by phone or something like that.
3 Mr. Johnson?

4 MR. JOHNSON: If he has an hour on cross, is there
5 any reason we wouldn't be able to do closings tomorrow?

6 THE COURT: No. It's just that everybody
7 underestimates the time; but you're right, if we have time
8 to do closings tomorrow, we will have time to do closings.
9 But I'm not worried really about the schedule tomorrow.
10 Remember we are going to start a little later tomorrow at
11 9:15, 10:15 Dr. McCrary's time, so we will have some
12 restrictions at the end of the day.

13 I don't know what's going to happen with the
14 courthouse. There's a lot of unknowns at this point. I
15 think we all need to be flexible, but I think it is safe for
16 us to adjourn for the day today, which is the immediate
17 question.

18 All right. If there is any more information that
19 the Court receives between now and tomorrow morning at 9:15,
20 we'll do our best to communicate with you. But otherwise, I
21 will see you then. I know there's some issues that we need
22 to discuss about exhibits and the like. We'll have to
23 figure out a time to do that. I suppose we could do some
24 right now.

25 Do we need to adjourn so we can cut off the

1 connection with SDNY? Are we able to proceed?

2 THE WITNESS: I can step out of the room if that's
3 what you're asking.

4 THE COURT: I think what we are able to -- so,
5 Dr. McCrary, we will see you in the morning. Thank you very
6 much.

7 THE WITNESS: Wonderful. Thank you.

8 (Witness excused at 5:00 p.m.)

9 THE COURT: All right. Very good. Let's see what
10 we can address. All right. Who wishes to address the Court
11 first?

12 One moment. Let me check with the court reporter
13 here. I hadn't asked her about her schedule.

14 (Discussion held off the record.)

15 THE COURT: All right. Mr. Nicholson.

16 MR. NICHOLSON: Matt Nicholson for PRMI, Your
17 Honor.

18 As I mentioned earlier, there are a couple of
19 bankruptcy -- well, more than a couple, but there's a list
20 of bankruptcy-related exhibits that the parties I think
21 would like to move into evidence. There are a number of
22 them that the parties have met and conferred on and I
23 understand there's no objection. So I would like to move in
24 defendant's documents. These are being moved in pursuant to
25 the stipulation related to Mr. Lipps' testimony that these

1 documents are authentic and be moved in without a sponsoring
2 witness.

3 THE COURT: Okay. And there's no objection to
4 their admissibility; is that correct?

5 MR. NICHOLSON: Correct, yeah. And I will specify
6 the purpose for which they're being admitted. And so I
7 thought I would go through the ones for PRMI that I
8 understand there's no objection on. Mr. Scheck will do the
9 same for plaintiff, and then we could address the handful
10 that there are objections on.

11 THE COURT: Okay.

12 MR. NICHOLSON: Okay. So the first category
13 consists of proofs of claim filed against RFC in the
14 bankruptcy, and we seek to admit these for the non-hearsay
15 purpose of showing the claims that RFC faced in the
16 bankruptcy, and I can read those into the record.

17 THE COURT: Okay. The non-hearsay -- what do you
18 mean?

19 MR. NICHOLSON: So not for the truth of the
20 allegations in --

21 THE COURT: Not for the truth?

22 MR. NICHOLSON: -- but for the types of claims
23 that were being made.

24 THE COURT: Okay. So you concede it's hearsay.
25 They're not being admitted for the truth of the matter, but

1 rather to show the types of claims that were made; is that
2 right?

3 MR. NICHOLSON: Just as a matter of terminology,
4 they would be hearsay if being offered for the truth, and we
5 are not seeking to do that.

6 THE COURT: That's right.

7 MR. NICHOLSON: We are just seeking to use them
8 non-hearsay to as evidence of the types of claims RFC faced
9 in the bankruptcy. It's consistent with what plaintiff has
10 done. They've moved in various proofs of claim. We're
11 simply doing the same thing for the same purpose.

12 THE COURT: Okay.

13 MR. NICHOLSON: So these are DTX-494, DTX-497,
14 DTX-502, DTX-508, DTX-509, DTX-510, DTX-511, DTX-512,
15 DTX-513, DTX-514, DTX-515, DTX-516, DTX-517, DTX-518,
16 DTX-519, DTX-520, DTX-521, DTX-522, DTX-523, DTX-568,
17 DTX-569.

18 THE COURT: Okay. For the limited purpose
19 articulated by Mr. Nicholson, the following DTX documents
20 are received into evidence. DTX-494, DTX-497, DTX-502,
21 DTX-508, DTX-509, DTX-510, DTX-511, DTX-512, DTX-513,
22 DTX-514, DTX-515, DTX-516, DTX-517, DTX-518, DTX-519,
23 DTX-520, DTX-521, DTX-522, DTX-523, DTX-568 and DTX-569.

24 MR. NICHOLSON: That's consistent with my list,
25 Your Honor.

1 THE COURT: Thank you, Mr. Nicholson.

2 MR. NICHOLSON: And the second category that we're
3 seeking to move in, and for which I understand there's no
4 objection are three briefs filed in the bankruptcy. We're
5 seeking to admit these for non-hearsay purpose for effect on
6 listener and information that was available to RFC at the
7 time of the settlement. The three exhibits are DTX-536,
8 DTX-539, DTX-541.

9 THE COURT: Okay. For the limited purpose
10 articulated by Mr. Nicholson, the following documents are
11 received into evidence: DTX-536, DTX-539, and DTX-541.

12 MR. NICHOLSON: Thank you, Your Honor.

13 THE COURT: Thank you, Mr. Nicholson.

14 Mr. Scheck.

15 MR. SCHECK: Good afternoon, Your Honor. Matthew
16 Scheck from Quinn Emanuel.

17 Mr. Nicholson correctly described the sort of
18 process we went through and we were able to resolve on all
19 but a few. I want to make sure -- we're going to move a
20 couple of additional documents into evidence that are not
21 objected to. I want to make sure I don't duplicate because
22 we had some on our list, so I will try to be a little
23 careful. The first is PTX-145.

24 THE COURT: Just before you continue, are these
25 documents all being offered for the limited purpose

1 articulated by Mr. Nicholson?

2 MR. SCHECK: Yes, sorry, I was going to get to
3 that. I should have prefaced it. PTX-145 is for the
4 limited purpose articulated by Mr. Nicholson. It is not a
5 proof of claim. It is a brief by the Steering Committee of
6 investors in connection with the 9019 in the bankruptcy, in
7 the original settlement.

8 THE COURT: Thank you.

9 MR. SCHECK: We are also moving PTX--- I'm sorry.
10 DTX-578, which is also a brief that is the Debtor's Brief in
11 Support of Confirmation, also being used -- offered for a
12 non-hearsay purpose. And I believe those are the only two
13 that are not duplicative of Mr. Nicholson's list. The
14 remaining exhibits have objections to them and I can address
15 those now and then, of course, give Mr. Nicholson a chance
16 to address.

17 THE COURT: Okay. PTX-145 and DTX-578 are
18 received into evidence for the limited purpose identified by
19 both Mr. Scheck and Mr. Nicholson.

20 How many documents are we going to discuss that
21 have objections, just so I have some idea?

22 MR. SCHECK: Yes. It is four documents for which
23 there are objections, which fall into two categories.

24 THE COURT: Okay.

25 MR. SCHECK: And so the first is PTX-153, and that

1 is the RMBS trustees' statement regarding the 9019 original
2 settlement. And as Your Honor may recall, the RMBS trustees
3 were not the parties that entered into the original RMBS
4 settlement in the bankruptcy and Judge Glenn asked the RMBS
5 trustees to submit a statement on their position regarding
6 that original settlement, and that statement reflects --
7 that brief on behalf of the trustees reflects the trustees'
8 position on the claims at issue, the reasonableness of that
9 original settlement, and the allocation of that settlement.

10 THE COURT: So that is a statement that would have
11 been available at the time of the mediation of the
12 settlement?

13 MR. SCHECK: Yes. And our view is that we have
14 come to an agreement after discussions that, you know,
15 briefs -- certain briefs filed by the parties should come in
16 for -- you know, can come in for a non-hearsay purpose, and
17 we don't see any basis to distinguish between, for example,
18 the objection of MBIA that PRMI seeks to put in and the RMBS
19 trustees' statement, particularly in the context where
20 Mr. Woll, for example, an expert witness, got up and
21 purported to in his statements admittedly speculate
22 regarding the intentions and incentives of the RMBS
23 trustees; that the RMBS trustees' position is best reflected
24 in the position they gave, which was available to the
25 parties.

1 The other thing I'll say about the relevance of
2 the RMBS trustees' statement is there has been an ongoing
3 sort of dispute in this case since before trial about
4 Mr. Pfeiffer because there's some -- been some arguments by
5 PRMI that Mr. Pfeiffer and Duff & Phelps -- the declaration
6 was put in after the supplemental term sheet in May 2013.

7 Now, we've taken the position that there's a
8 reason there's a settlement period here, because a
9 settlement is effective when it's approved by the bankruptcy
10 court. Nonetheless, what this RMBS trustee's statement
11 shows is two important things about the allocation.

12 First, this statement was put in in December of
13 2012, and it was filed February 2013, and the reason for
14 that is Judge Glenn was actually trying to encourage
15 settlement and so he had a scheduling order where he asked
16 the parties to exchange all of these expert reports and
17 briefs in December of 2012, but they wouldn't be filed until
18 after February 1, 2013.

19 So in December 2012 the RMBS trustees put in a
20 statement that said we have reviewed the original
21 allocation, the net losses allocation, and they said we've
22 talked with parties-in-interest and there are objections to
23 this allocation. And so we have asked the debtors, RFC and
24 the other debtors, and the steering committee of investors,
25 to revise that allocation and we've done this based on the

1 advice of Duff & Phelps, and they have agreed to use the
2 revised allocation methodology, which we all know became the
3 breaching loss methodology that Dr. -- I'm sorry --
4 Mr. Hawthorne discussed, I didn't mean to elevate him there.
5 And so that was done in December 2012.

6 So it shows, first, that the revised allocation
7 was discussed among numerous parties-in-interest that the
8 doters had agreed to revise that allocation and were part of
9 this -- were part of the discussions and the decision, and
10 that it was ultimately the debtors that decided to revise
11 that methodology prior to May 2013, and of course ultimately
12 put it in their plan of reorganization. So it's relevant
13 for that reason.

14 And secondly -- well, actually, I'm sorry, I
15 covered both of them in that sentence because it was that
16 the debtors were involved, something that has been disputed
17 because PRMI has referred to as just the trustees'
18 allocation, and secondly the timing.

19 So unless Your Honor has questions about that
20 document, I can move on to the next one.

21 THE COURT: Okay.

22 (Counsel confer.)

23 MR. SCHECK: Mr. Nicholson asked a fair question,
24 which is do we want to address them one at a time or all in
25 a row?

1 THE COURT: Well, you said there were two
2 categories. Is this one of two in one category?

3 MR. SCHECK: This is actually one of one in one
4 category. The other three are in the other category. So I
5 would be happy to let Mr. Nicholson respond.

6 THE COURT: That might make sense.

7 MR. NICHOLSON: Matt Nicholson for PRMI.

8 Your Honor, we object to the admission of PTX-153.
9 The primary purpose that Mr. Scheck has articulated for
10 admitting this document are for the background facts that
11 are represented in that document regarding supposed
12 negotiations over the creation of the trust allocation
13 methodology among the RMBS trusts.

14 So setting aside the relevance issues, because we
15 think this has little if any relevance, there's a core
16 hearsay problem here. This is a background section in a
17 brief purporting to describe facts about, as Mr. Scheck I
18 think is articulating it, who participated in discussions,
19 what they said, and when they said it. These statements are
20 being offered for their truth about who supposedly
21 participated, when they participated, and what they said.
22 That is a core hearsay problem.

23 On top of that, there are multiple layers of
24 hearsay in this document. It is an out-of-court statement
25 by the trustees purporting to talk about what was told to

1 them by the parties to the original settlement -- I'm not
2 even clear who was saying what -- but it's double hearsay
3 because the trustees' out-of-court statement about an
4 out-of-court statement by an unidentified parties to the
5 original settlement. So it's being used for hearsay
6 purpose.

7 If plaintiff wanted to prove facts about the
8 mechanics of coming up with the RMBS trust allocation, they
9 should have called fact witnesses to establish those facts.
10 They can't cure that problem of proof now by relying on the
11 background statement of a hearsay brief that itself contains
12 multiple levels of hearsay.

13 Now, as I understand it, there were two principle
14 other arguments by Mr. Scheck. The first was that this is
15 relevant to show the Trust's view that the allocation
16 between Duff & Phelps was fair and equitable. I'm really
17 not sure what the relevance of that is because this case
18 isn't about whether Duff & Phelps' allocation was reasonable
19 for purposes of allocating among the trusts. This case is
20 about whether their allocation is reasonable here under
21 *UnitedHealth* for purposes of allocating amongst originators.

22 But setting that aside, I don't think they should
23 be able to put in this brief for -- I think what it's being
24 used for is the truth of the statement that this allocation
25 method is fair and equitable and reasonable.

1 On top of that, I heard Mr. Scheck articulate that
2 this brief contains information available to the parties at
3 the time of settlement. That type of reason for relevance
4 pertains to the *UnitedHealth* inquiry, right, where you look
5 at the information available to the parties at the time of
6 settlement. That's information about the strengths of the
7 claims and defenses.

8 And here, if you look at this very short document,
9 it doesn't really contain any discussion whatsoever of the
10 strengths of the claims and defenses. There's no
11 discussion, say, of the statute of limitations. There's no
12 discussion of the reps and warranties. It's just a
13 generalized statement that these trustees think that their
14 allocation method among themselves is reasonable.

15 So I don't think that it pertains to the
16 *UnitedHealth* inquiry, so it's not relevant to that. It's
17 really being used for a hearsay purpose to try to, I think,
18 fix a gap in their case that they should have called fact
19 witnesses, I suppose, if they wanted to prove facts about
20 this negotiation. They shouldn't be able to cure that
21 through a hearsay document at this late juncture.

22 Thank you.

23 THE COURT: Mr. Scheck, do you wish to respond to
24 the hearsay concerns raised by Mr. Nicholson?

25 MR. SCHECK: Very briefly, if I may, Your Honor.

1 I don't recall stating that this would be used to show that
2 the allocation was fair and equitable. So I don't think
3 that was a consideration.

4 I will say the timing of it can't be a hearsay.
5 The idea is that the revised allocation was done in a
6 document that was filed February 4, 2013, but that was
7 signed December 2012 and served on the parties-in-interest,
8 including the debtors. So that timing issue remains
9 relevant.

10 The other thing I will say, it's actually simply
11 not true that it doesn't discuss the strengths and
12 weaknesses of claims. In paragraph 11 of that document the
13 trustees specifically state their view that the allocation
14 methodology sufficiently accounts for the differences among
15 the characteristics of each settling trust. That was
16 information available to the parties; and Mr. Nicholson
17 raised *UnitedHealth*, and I know we have our disagreements
18 about *UnitedHealth*, but one of the things that's interesting
19 is that Judge Schiltz and the district court opinion in
20 *UnitedHealth* -- well, I'll take a step back.

21 First, *UnitedHealth* never says anywhere that it is
22 only the view of the defendant that counts. That is just
23 nowhere in the opinion. In fact, it refers to parties when
24 it talks about what was available to the parties.

25 Secondly, Judge Schiltz's opinion has an

1 interesting footnote because he says UnitedHealth raised the
2 prospect of potentially offering a different type of
3 evidence to support allocation, which is allocation among
4 the claimants themselves. And what Judge Schiltz said was
5 he didn't say that wouldn't be relevant. That would be
6 crazy. That has nothing to do with UnitedHealth. He said
7 but they never offered that evidence. That's what he said
8 in the footnote. They never offered it. So it became a
9 nonissue. But nobody at any level has ever suggested that
10 the only view that could possibly matter is that of the
11 defendant themselves.

12 And the last thing I'll say about the document is
13 it reflects the views of the defendant itself, RFC, because
14 RFC -- sorry -- the trustees said specifically in this
15 document in a footnote if the debtors and the steering
16 committee do not change this allocation methodology, we
17 reserve our right to object. So we are putting in our
18 statement of support on the basis that the debtors have
19 agreed that they are going to change this methodology. And
20 it is the debtors that had to put that methodology into the
21 plan and go before Judge Glenn and ask for that plan,
22 including the settlement and the allocation, to be approved.

23 So I went on far longer than my promised very
24 briefly, but that would be my response, Your Honor.

25 THE COURT: Mr. Nicholson.

1 MR. NICHOLSON: 30 seconds on the hearsay issue.
2 Your Honor, on the hearsay issue, I mean, the only
3 response -- substantive response I hear from Mr. Scheck is
4 that this goes to the timing of changes made in the
5 allocation methodology. But of course whether there were
6 changes made at a certain time or not depends on the truth
7 of the statements that are in the brief about those changes
8 being made.

9 And so his shift to timing does not address the
10 hearsay problem. That's dependent upon truth. And there
11 was no real response as to hearsay on how this is being used
12 for who participated, what was said, and what was done about
13 it. In fact, Mr. Scheck in the end focused -- was
14 describing what the trustees said about what the debtors
15 said about the Duff allocation. That's double hearsay, Your
16 Honor, so I don't think it comes in for that purpose.

17 And as to allocation, there's just a bare
18 statement here that the RMBS allocation accounts for
19 differences among trustees for purposes of distributing
20 among the trustees themselves. There's nothing about the
21 underlying information, the underlying strength of the
22 claims. They're just trying to use it for the bare
23 conclusion that's being made. They're trying to use that
24 conclusion for its truth to bolster their case and I don't
25 think that that should be permitted.

1 Thank you.

2 THE COURT: Well, I think the fair thing to do is
3 to admit it for the limited purpose that the other documents
4 are being limited for, because whether it's conclusory or
5 not, it was available to the parties at the time of the
6 mediation. So -- and whether or not the date this was
7 distributed is hearsay, I would have to think about that a
8 little bit. I'm not sure it is.

9 So I will admit it on the same basis as the other
10 documents are being admitted today.

11 Let's move on to the second category.

12 MR. SCHECK: Sorry. Good afternoon again, Your
13 Honor. The other category involves three declarations that
14 were also put in in the 9019. It is DTX-443, which is the
15 supplemental declaration of Jeffrey Lipps; DTX-547, which is
16 the reply declaration of Jeffrey Lipps; and DTX-538, the
17 reply declaration of Frank Sillman.

18 And, Your Honor, on these I think two overall
19 points that I want to make. The first is the parties have
20 agreed that brief statements of various parties should come
21 in primarily for an argument that actually PRMI has been
22 making for a long time, which is it was information
23 available to the parties. And we agree in this context
24 where there is not a jury, there is not a danger of
25 prejudice because a jury would have a lot harder time

1 distinguishing between the truth versus the limited purpose.
2 And we see little distinction between the briefs that were
3 mentioned -- or sorry -- the briefs that were agreed upon
4 and these declarations, which were served as part of that
5 same litigation, the 9019 litigation; and, in fact, are the
6 subject of many of the briefs.

7 One of the documents that PRMI has used a lot and
8 offered into evidence today is the MBIA objection, and that
9 objection, speaking of hearsay on hearsay, is a big part of
10 it that they've used is the characterization of Mr. Lipps'
11 declaration itself, which is to say that MBIA argues in its
12 objection that Mr. Lipps says the statute of limitations was
13 a potential defense.

14 And so we have a situation where information
15 available to the parties involves an objection that refers
16 to a declaration, but of course the declaration itself is
17 information available to the parties.

18 The other piece that I think is important is on
19 January 23rd I stood up here as part of the pretrial
20 conference and I made a point that it looked to me like PRMI
21 was going to try and introduce every instance of somebody at
22 RFC or a representative or anyone in the bankruptcy saying
23 statute of limitations is a potential defense. And what I
24 said to that is I don't know that we need that because we
25 can all stipulate that it was a potential defense. Nobody

1 is disputing that.

2 But that's what they want. They want just that
3 statement, just that quote from Mr. Lipps' declaration from
4 the MBIA objection in, because the parties were aware that
5 Mr. Lipps said statute of limitations was an issue. The
6 parties were aware that MBIA made that point.

7 What they don't want is any of the context or
8 explanation surrounding it, the explanation that there were
9 strong counter-arguments to the statute of limitations that
10 we saw that Mr. Woll ignored. That's what they don't want.
11 But you can't do that. The Federal Rules of Evidence say
12 you can't do that. Federal Rule 106, rule of completeness,
13 it's not just for deposition designations. It also includes
14 a situation like this where you want to stand up and say
15 statute of limitations was a defense. Mr. Lipps himself
16 said so. Okay, let's look two lines down where he explains
17 the context of that and what it means.

18 And during Mr. Hawthorne's testimony, Mr. Johnson
19 was asking him questions and said, Well, you acknowledge
20 that Mr. Lipps said it was a defense; and Mr. Hawthorne said
21 yes; and then two lines down and Mr. Johnson said, I move to
22 strike that. But that's what they want. They don't want
23 the context, but it's admissible under 106.

24 And so we believe those are admissible for the
25 same reason the briefs are, and I'll give Mr. Nicholson a

1 chance to respond.

2 THE COURT: Thank you.

3 Mr. Nicholson.

4 MR. NICHOLSON: Thank you, Your Honor. Matt
5 Nicholson for PRMI.

6 Discussing Mr. Lipps' declarations, I understand
7 Mr. Scheck's argument to be that these are equivalent to the
8 briefs that we discussed earlier, but I think that they are
9 readily distinguishable in two ways.

10 The first way is that this is an expert
11 declaration. It's an expert declaration offered by
12 Mr. Lipps, who I believe is sitting in the courtroom, who
13 was counsel for RFC. It explained his substantive views as
14 a purported expert on the state of the law at the time.

15 So I think when a party seeks to use an expert
16 declaration, as plaintiff is seeking to do here, they are
17 really trying to use it for the truth of the opinions that
18 are offered therein. Those opinions only matter, of course,
19 if they are true. They're not seeking to use this solely
20 for information available at the time.

21 And the Court has articulated -- this Court has
22 articulated a particular concern with parties seeking to use
23 experts from other cases as experts in this case. And
24 that's essentially what the plaintiff is trying to do here.
25 They are enlisting RFC's purported expert in the bankruptcy,

1 Mr. Lipps, as a second expert here on issues like statute of
2 limitations. I would note for the record that I believe
3 that Mr. Lipps' declarations were actually struck in the
4 bankruptcy and he was required to submit limited
5 declarations only on facts.

6 And that takes me to the second point, which is
7 this document is completely different than the briefs that
8 we discussed earlier because there's a classic sword and
9 shield problem. Your Honor may recall that Mr. Lipps has
10 been deposed about this document. We sought discovery about
11 this document in connection with his deposition in the First
12 Wave, and he was precluded from testifying about the bases
13 for the opinions offered in his declaration because
14 plaintiff asserted privilege.

15 Now, that was their choice to assert privilege and
16 to present that testimony, but it has collateral
17 consequences and one of those consequences is that having
18 invoked the privilege as a shield, they can't now put
19 Mr. Lipps' declarations into evidence as a sword when we
20 haven't had the opportunity to depose him on the bases for
21 his opinions there.

22 Now, I'd also note that this same issue came up in
23 the *HLC* trial, and the Court will recall that Mr. Lipps was
24 limited to testifying as a witness about historical facts,
25 not about his legal opinions on the state of the law at the

1 time of the bankruptcy.

2 Now, obviously if Mr. Lipps had testified live
3 here, we think that the same rule would have applied. That
4 he would have only been able to testify about historical
5 facts pertaining to the bankruptcy. He wouldn't have been
6 able to offer the legal opinions about the state of the law
7 in his declaration.

8 And the result should be no different, Your Honor,
9 just because plaintiff is now seeking to instead of calling
10 Mr. Lipps, to put in his declaration itself. It's the same
11 analysis. There would obviously be a problem with Mr. Lipps
12 testifying about those opinions live, and there's equally a
13 sword and shield problem about them putting in his
14 declarations into evidence now.

15 Now, Mr. Scheck also referred to an incompleteness
16 problem. I think that that argument is misplaced here.
17 That argument would have merit if we were seeking to, say,
18 introduce into evidence Mr. Lipps' declarations, but only
19 one paragraph of them or only one sentence. We've made no
20 effort to do that. We're not seeking to admit these
21 declarations into evidence at all.

22 What Mr. Scheck was referring to is that both
23 sides' experts considered a number of hearsay documents from
24 the bankruptcy as part of their expert opinions. Experts
25 are allowed to rely on hearsay, so both sides did it. And

1 the experts have given opinions that are in connection with
2 Mr. Lipps and so both experts, Mr. Woll and Mr. Hawthorne,
3 were cross-examined about their opinions insofar as they
4 relate to Mr. Lipps' declaration.

5 So there's been an airing of the disputes about
6 the meaning of the declaration through the experts. What
7 can't be done now is for the declarations to come in as
8 substantive evidence to be used as an expert in another case
9 and where there's this really serious sword and shield
10 problem where we never had an opportunity to depose
11 Mr. Lipps about the underlying bases for his opinions
12 because of the assertions of privilege.

13 THE COURT: All right. Well, I'm confused so,
14 Mr. Scheck, I need you to clarify for me. Are you seeking
15 to introduce the Lipps' declaration as an expert opinion or
16 are you seeking to introduce -- and I should say Mr. Sillman
17 as well -- the three declarations as non-hearsay for the
18 limited purpose of adding to the pile of things that folks
19 have before them at the time of the mediation?

20 MR. SCHECK: Well, it's certainly the latter, Your
21 Honor, because all of these -- I mean, Mr. Cornell for
22 example, we did not designate his deposition. I think we
23 did some counter-designations, but PRMI designated
24 Mr. Cornwell, Dr. Cornwell's deposition. He was an expert
25 in the bankruptcy. He's not an expert here. And a great

1 swath of that deposition is counsel reading to Mr. Cornell
2 from his expert report -- I'm sorry, a great swath of the
3 designations reading from his expert report, which was not a
4 declaration, and saying do you see that? Yes. And that's
5 the designations.

6 So if we're going to open the door to talk about
7 what's proper in terms of information available to the
8 parties, it becomes a distinction you can't draw between
9 some of the designations we're dealing with here, some of
10 the briefs we're dealing with. I mentioned the MBIA brief.
11 What PRMI has used it for primarily is their statement about
12 Mr. Lipps' statement about the statute of limitations and
13 their argument about statute of limitations.

14 Now, to be fair, they use it for some other things
15 about arguments that were made by MBIA.

16 But if we're going to start drawing that line, it
17 is not the Sillman declaration and the Lipps declarations.
18 It really is all of these issues. So we just don't believe
19 that you can agree to put some subset here in front of the
20 Court when it boils down to all the same thing. We are not
21 offering Mr. Lipps as an expert. And I do want to clarify a
22 couple of other things.

23 Mr. Lipps' declarations were not struck in the
24 bankruptcy. His declarations related to the FGIC settlement
25 were treated in part as briefs, which by the way, supports

1 the notion that they should be in because they would be
2 similar to a debtor's brief. Some of it was struck to the
3 to the extent that the debtors were trying to use a reliance
4 on counsel defense. That was the FGIC ones.

5 But Judge Glenn never struck the original
6 declarations. There was debate about them, but in the end
7 many of the paragraphs of those FGIC declarations that were,
8 in fact, partially struck were instead accepted by the Court
9 as additional briefing. And so it really is no different
10 than the other subject matter that the parties have agreed
11 upon and that the Court is accepting only for the limited
12 purpose.

13 The last thing I'll say is that the parties
14 designated Mr. Kruger's deposition and Mr. Kruger was the
15 chief restructuring officer who signed the Plan Support
16 Agreement and Supplemental Terms Sheet on behalf of RFC and
17 the other debtors, and Mr. Kruger testified that he
18 specifically reviewed in advance of signing that document
19 Mr. Sillman's declaration from the original settlement. So
20 I cannot think of a more quintessential information
21 available to the party than that one.

22 Unless Your Honor has questions, I'll sit down.

23 THE COURT: I think the only fair way to do this
24 is to, again, allow these three declarations, DTX-43 [sic],
25 DTX-537, and DTX-538 into evidence for the very limited

1 purpose, non-hearsay purpose, of having before us the
2 information that was available to the parties at the time of
3 the settlement, which is very important under any
4 *UnitedHealth* analysis.

5 Fortunately, we don't run into the concerns that
6 we might with a jury, that they would have a hard time
7 sorting through the use of these exhibits for the truth of
8 the matter asserted versus the limited use of having a more
9 complete record about what was available to the parties at
10 the time of the settlement, but the Court is clearly able to
11 do so.

12 And I'm very concerned that by not allowing this
13 in, it would be a cherry-picked record, and that is hardly
14 going to advance the ball here. Let's take a look at what
15 was before the parties at the time that they settled this
16 case.

17 So again, I will permit these last three
18 declarations into evidence, again, only for that limited
19 purpose.

20 Mr. Nicholson.

21 (Counsel confer.)

22 MR. SCHECK: Sorry. I have one correction and
23 then one issue that came up. I believe Your Honor said
24 DTX-43 and that is DTX-443.

25 THE COURT: 443. I'm sorry. I wrote that down

1 incorrectly.

2 MR. SCHECK: And there might be some confusion
3 because I believe Mr. Nicholson was saying that he didn't
4 think that the Sillman declaration was one of the exhibits
5 mentioned. I haven't had a chance, between standing up, to
6 look if that's correct, but perhaps before admitting
7 DTX-538, maybe we should talk and we could just chat in the
8 morning.

9 THE COURT: That's no problem.

10 MR. SCHECK: Okay. I apologize, Your Honor.

11 THE COURT: I wrote down 538 and I put Sillman,
12 but why don't we clarify that.

13 MR. NICHOLSON: Yeah, we would just like to be
14 heard on that one as well, because I think the issues are
15 separate from this.

16 THE COURT: Why don't we do that in the morning.

17 MR. NICHOLSON: Thank you.

18 THE COURT: Anything else we should address this
19 evening? Mr. Nicholson.

20 MR. NICHOLSON: Your Honor, there is one more
21 issue, and I think we need to address it now because it's
22 relevant to closings in the morning or in the afternoon --

23 THE COURT: Before we get there, you folks aren't
24 going to be able to get out of the courthouse, and I suspect
25 that's something of interest to you. So don't just walk out

1 of here. You're going to have to have my staff accompany
2 you. So whatever you are doing in these small conference
3 rooms after we finish this, do it quickly so that they can
4 go home too.

5 Go ahead.

6 MR. NICHOLSON: Okay. So there's an issue about
7 DTX-789, which is a summary exhibit.

8 THE COURT: 789?

9 MR. NICHOLSON: Yes, Your Honor.

10 THE COURT: Is this something we can talk about
11 tomorrow or not?

12 MR. NICHOLSON: So we have an interest in talking
13 about it now because it's relevant to closing and slides
14 that go into that and things that need to be done tonight.

15 THE COURT: All right. This is a 1006 exhibit?

16 MR. NICHOLSON: Yes, Your Honor. So this exhibit
17 was served under the four-day disclosure protocol, as
18 Mr. Clouser, I believe, mentioned earlier today. There was
19 no objection by plaintiff pursuant to the disclosure
20 protocol. This is a -- just for background, this is a
21 summary exhibit prepared by a paralegal that is just simply
22 taking data from a spreadsheet provided by the plaintiff in
23 discovery about the global population of loans and simply
24 calculating very basic percentages based on this giant --

25 THE COURT: Who will be the sponsoring witness for

1 this?

2 MR. NICHOLSON: Your Honor, the sponsoring witness
3 would be the paralegal who prepared it; and had they
4 objected pursuant to the four-day disclosure protocol, that
5 person would be here now to answer basic questions about how
6 they just calculated these simple percentages. There was no
7 objection raised to the document at all, much less for a
8 request for a 1006 hearing. We would have been happy to
9 have that paralegal appear here.

10 And so I fail to see how they have any valid
11 objection now. I think any objection at this point has been
12 waived. And there really is no need anyway for a paralegal
13 to testify about its creation because it is simply adding up
14 percentages -- or calculating percentages based on this
15 Excel spreadsheet that they provided in discovery. So
16 there's been no objection. It's a very simple objective
17 1006. It raises none of the purported issues that were
18 discussed in connection with the repurchase database 1006
19 earlier.

20 This is prepared, like I said, by a paralegal, by
21 a nonlawyer. That's standard practice when preparing 1006;
22 and like I said, had they raised any objection three days
23 ago to it, we would gladly put that person up. But having
24 heard no objection, of course we didn't bring into court
25 today the paralegal to testify about it. And I don't think

1 that there's any need to because, like I said, it's a very
2 simple calculation of statistics based on their own
3 spreadsheet of the global population.

4 THE COURT: Who wishes to address this?
5 Mr. Miller.

6 MR. MILLER: Thank you, Your Honor. I will keep
7 this brief in the interest of everyone's evening schedules.

8 So Mr. Nicholson is correct that this was served
9 under the four-day disclosure and, frankly, Your Honor, we
10 overlooked it because it wasn't attached to a witness, and
11 in order to have a 1006 exhibit it has to have a sponsoring
12 witness. This is, of course, very similar, almost
13 completely similar, to what we went through with DTX-736,
14 also known as DDX-11, which was the supposed 1006
15 summarizing the investor repurchase database, and the
16 critical issues and flaws that that exhibit suffered from
17 are of course what this exhibit suffers from, which is that
18 there's no fact witness or expert who can sponsor it, and
19 also that -- whether it was created by a paralegal or not --
20 these exhibits cannot be sponsored by attorneys, members of
21 the trial team, members of the law firm that are trying the
22 case.

23 We have since objected. We put in an objection
24 over the course of the day today, so we do have an objection
25 on the record; and we, of course, object today. As to

1 whether a paralegal would have been available, again,
2 doesn't address the 1006 issue; and also no witness, no
3 paralegal witness has been disclosed in any of their witness
4 disclosures, so I don't know about that one.

5 And that's all I have on that, Your Honor.

6 THE COURT: All right. Very good.

7 Mr. Nicholson, are you aware of authority that
8 permits the trial team to get up and explain how they come
9 up with a 1006 exhibit? I've not ever seen that before.

10 MR. NICHOLSON: Your Honor, my --

11 THE COURT: Suppose they had objected, what would
12 you have done?

13 MR. NICHOLSON: This paralegal that prepared this
14 is not a member of the trial team. It's an employee of the
15 Zelle law firm and has no connection to the case. So the
16 assertion that --

17 THE COURT: Well, the Zelle law firm is part of
18 the trial team.

19 MR. NICHOLSON: Is not -- correct, but this
20 paralegal has had no participation in the case. It is
21 standard practice to have a paralegal serve as a 1006
22 exhibit.

23 THE COURT: It's a standard practice? Where does
24 that come from?

25 MR. NICHOLSON: Your Honor, it comes from

1 plaintiff's own authority. Your Honor, when we had a
2 dispute about the 1006 exhibit, they cited several cases and
3 one of those cases addressed the fact that it's standard,
4 especially in criminal cases, for a paralegal working with a
5 prosecutor's office to summarize documents in an objective
6 way and put in one of these documents like this and testify
7 about it. There's nothing -- someone has to serve as that
8 person. This is a document that's served in litigation by
9 plaintiff.

10 THE COURT: That's why typically experts create
11 these documents.

12 MR. NICHOLSON: Your Honor, I don't think that
13 that's -- there's no -- if you look at 1006, there's
14 absolutely no requirement to even have a sponsoring witness.
15 There's especially no requirement that it be an expert; and
16 plaintiff's own authority indicates it can be a paralegal.
17 And here there's no concern about any sort of bias by the
18 paralegal. It was not a member of the trial team.

19 On top of that, Your Honor, I mean, this is a
20 classic example of sandbagging. They did not -- whether it
21 was intentional or not, that's the effect. Mr. Miller says
22 it was overlooked. I take him at his word that it was
23 overlooked, but it was overlooked nonetheless. The fact of
24 the matter is for them to object now at this late juncture
25 on the eve of closing argument I think is sandbagging in

1 effect.

2 We gladly would have brought this paralegal in
3 today to answer any questions that Mr. Miller had. He
4 didn't raise any substantive concerns as far as I could tell
5 about the data there, but even if he did, the proper way to
6 do it would have been to lodge an objection in a timely
7 manner, for us to bring in the paralegal and for her to
8 explain how she did this, and there was no objection
9 whatsoever on that score. So I think it's too late in the
10 day for them to raise it now.

11 THE COURT: Okay. I'm not going to rule on the
12 basis of waiver. I'm going to have to go back and look at
13 that case law. It's not been my experience for 40 years
14 that we have paralegals on the -- the law firm is the part
15 of the trial team. So this is a paralegal at a law firm
16 that is your local counsel.

17 MR. NICHOLSON: You're right, Your Honor.

18 THE COURT: So this is not the standard -- trust
19 me -- the way this is done. It's not standardly done by a
20 paralegal from one of the law firms representing a party.
21 But I will be glad to go back and look at the case law.

22 There might be an unusual situation in a criminal
23 case where it's done, but to suggest or represent to the
24 Court this is the standard way this is done, which is what
25 you have said, is just not true. It's a exaggeration. But

1 I will go back and take a look and see; and if it's possible
2 for a paralegal at one of the law firm who is local counsel
3 representing one side to get on the stand, they're here,
4 we'll have them get on the stand tomorrow.

5 So I'll take a look at it tonight and we'll figure
6 out how to go from there.

7 MR. NICHOLSON: Your Honor, I just wanted to add
8 one point. The case that I am referring to is plaintiff's
9 own case. It referred to paralegals doing this in criminal
10 cases. The paralegals for the Government U.S. Attorney's
11 Office, right? That is the exact same kind of situation
12 here. A paralegal employed by one of the firms involved. I
13 don't see how it's any different.

14 And if Your Honor disagrees with it being standard
15 practice, I'm happy to accept that you have much more
16 experience in these matters than I do, and so perhaps that
17 label is not correct; but I don't think that there's any
18 barrier to having a paralegal serve this purpose and
19 plaintiff's own authority I think indicated that.

20 THE COURT: All right. Well, I'm going to have to
21 take a look at that case law tonight and I will make a
22 judgment in the morning, but you should have the paralegal
23 ready to go in the morning.

24 MR. NICHOLSON: Yes, Your Honor.

25 THE COURT: All right. Anything further tonight?

1 All right. So my staff will help you get out of
2 the building. We'll see you tomorrow morning.

3 Court is adjourned.

4 (Court adjourned at 5:49 p.m.)

5 * * *

6 We, Lori A. Simpson, and Carla R. Bebault, certify
7 that the foregoing is a correct transcript from the record
8 of proceedings in the above-entitled matter.

9
10
11 Certified by: s/ Lori A. Simpson
12 Lori A. Simpson, RMR, CRR

13 Certified by: s/ Carla R. Bebault
14 Carla R. Bebault, RMR, CRR
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